81-2353

No. 81-2153

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In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL P. GRACE,
Petitioner,

v.

SANTA FE PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals has incorrectly interpreted and applied this Court's holding in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968), that arbitrators must disclose to the parties any dealings that might create an impression of possible bias to the facts of this case and in conflict with other interpretations and applications of the *Commonwealth Coatings* ruling by other Courts of Appeal and U. S. District Courts.

2. Whether Petitioner's right to due process of law has been violated by the refusal of the U. S. District Court and the Court of Appeals to grant Petitioner an evidentiary hearing on matters relating to the conduct of the arbitration proceeding, including the non-trivial relationships between the neutral arbitrator and one of the parties and its counsel, which were outside the arbitration record.

3. Whether the Court of Appeals erred in allowing the District Court to interfere in subsequent arbitration proceedings and with the right of Petitioner to seek arbitration.

4. Whether the Petitioner, and persons similarly situated, should be prohibited from employing solution mining to recover uranium, rather than conventional uneconomical mining techniques, because of the failure of the arbitration panel, U. S. District Court and Court of Appeals to recognize solution mining as a method of commercial production, contrary to the public interest at this time of a depressed uranium industry.

PARTIES

Michael P. Grace, Petitioner herein, Appellant before the Court of Appeals and Defendant-Cross Defendant before the U. S. District Court.

Corrine Grace, Appellant before the Court of Appeals and Defendant-Cross Defendant before the U. S. District Court.

Santa Fe Pacific Railroad Company, Appellee before the Court of Appeals and Defendant-Cross Claimant before the U. S. District Court.

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No. 81-2153

In the
Supreme Court of the United States
OCTOBER TERM, 1981

MICHAEL P. GRACE,
Petitioner,

v.

SANTA FE PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Michael P. Grace, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on January 4, 1982, and the Order Denying Petitioner's Motion for Rehearing entered on February 23, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 668 F.2d 1140 (10th Cir. 1982) appears herein in Appendix A. The Order of the Court of Appeals denying rehearing dated February 23, 1982, appears in Appendix B. A letter from the Clerk of the U. S. Supreme Court relating the Order of Justice White, dated May 25, 1982, extending the time to file a Petition for a Writ of Certiorari to and including

June 23, 1982, appears in Appendix C. The opinions of the District Court for the District of New Mexico, dated April 1, 1980, and May 15, 1980, appear in Appendix D.

JURISDICTION

The decision of the U. S. Court of Appeals for the Tenth Circuit was entered on January 4, 1982, and a timely Petition for Rehearing was denied on February 23, 1982. On May 25, 1982, Justice White extended the time within which to petition for certiorari. This petition was filed within such extended time. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In June, 1968, Michael P. Grace, Petitioner, purchased six options from Santa Fe Pacific Railroad (Santa Fe) on property owned by Santa Fe believed to contain uranium-bearing ores in the Grants, New Mexico, area. Each option afforded Petitioner a three-year period within which exploration could be conducted, after which Petitioner had the option to enter into a uranium mining lease with Santa Fe.

In 1971, Petitioner exercised his options and entered into several uranium leases with Santa Fe. Each lease provided in part:

> "Lessor agrees that if during the term of this lease and agreement Lessee has found and at the expiration of the term of this lease is producing uranium-bearing ore in commercial quantities from the lease premises, Lessor will, upon written request . . . re-

> new this lease and agreement . . . upon the same terms and conditions . . ."

Each lease also provided:

> "Any dispute between the parties under this agreement shall be referred to arbitration, each party selecting one arbitrator and the American Arbitration Association designating the third arbitrator. The word of the arbitrator shall be final and binding upon the parties hereto."

Petitioner discovered substantial uranium reserves located at a depth of approximately three thousand to five thousand feet underground. Because of the depth of the uranium reserves, it was determined that traditional mining techniques would be uneconomical for the recovery of the uranium, and Petitioner began to solution mine the uranium. Solution mining is a process by which chemicals are injected into the ground, allowed to remain in uranium-bearing rock formations a short time, and then pumped to the surface with the hope of recovering U_3O_8 from the processing uranium suspended in the solution. By this process, Petitioner was able to recover a uranium-bearing solution, known as "yellow cake", and to successfully effect the sale of such uranium-bearing solution.

On June 2, 1976, Ormsbee Development Company, a drilling subcontractor, filed suit against Petitioner and his wife, Corrine, as Lessees, and Santa Fe, as owner of the properties, seeking to foreclose on Mechanics' Liens which it had filed after Petitioner had failed to pay it for drilling and exploration work. Other subcontractors intervened or filed companion cases, all of which were consolidated with

the Ormsbee claims on diversity jurisdiction. These disputes were ultimately settled and the complaint dismissed.

Santa Fe, however, filed an original, and on February 10, 1977, an Amended Cross-Claim against Petitioner seeking a determination that all of his rights and interests had terminated by reason of his failure to achieve production of uranium-bearing ore in commercial quantities as required by the leases.

Prior to Santa Fe filing its Amended Cross-Claim, Petitioner had, on July 19, 1976, filed a Demand for Arbitration with the Phoenix Regional Office of the American Arbitration Association seeking to declare his leases valid and in full effect. After Petitioner had filed a Motion for Stay of Proceedings with the District Court on Santa Fe's Cross-Claim pending arbitration, the District Court, on July 5, 1977, entered an Order directing that Petitioner would not be required to file an Answer to Santa Fe's Cross-Claims pending arbitration.

The arbitration process commenced with the Petitioner and Santa Fe each selecting an arbitrator and the American Association of Arbitrators (Association) selecting a third, neutral arbitrator, one Dr. Jack T. Mommsen (Mommsen). An arbitration evidentiary hearing conducted under the auspices of the Association began on April 17, 1979, and ended some two and one-half weeks later on May 1, 1979. On June 27, 1979, the arbitrators, with one member dissenting, entered their award, holding that the leases had "expired under the terms and on the termination dates defined in the leases", that the "leases are not valid", and that "all rights and interest of Grace in the leases are terminated."

On July 3, 1979, Santa Fe filed a Motion to confirm the award of the arbitrators. On September 25, 1979, Petitioner filed a Motion to vacate or set aside or modify the arbitration award.

On April 1, 1980, the District Court entered its opinion confirming the arbitration award in favor of Santa Fe. Thereafter, Petitioner filed a Motion for reconsideration of the April 1, 1980 opinion, in part on grounds that there had been a failure by Mommsen and the law firm representing Santa Fe to disclose non-trivial relationships with parties interested in the proceeding. It was pointed out to the court that among Mommsen's active clients were General Atomic Company, which is a partnership between Gulf Oil and Scallop Nuclear, and that the Modrall firm which represented Santa Fe also represents Gulf Oil; that Mommsen worked for Texas Eastern Nuclear, a subsidiary of Texas Eastern Company, and that the Modrall firm represents Trans-Western Pipeline Company, another subsidiary of Texas Eastern Company; that Mommsen was being considered as an arbitrator on a case with Homestake Mining Company, which was also represented by the Modrall firm; that Gulf Oil had attempted to purchase the Grace leases; that subsequent to the arbitration proceeding, Gulf Oil acquired leases for the property involved herein and that Mark Thompson, a partner in the Modrall law firm, had attended a lecture given by Mommsen for General Atomic and had met and talked with Mommsen.

On May 15, 1980, the District Court entered a Memorandum Opinion upholding its opinion of April 1, 1980. Petitioner had requested before the District Court that he be allowed to pursue discovery concerning the nondisclos-

ure and evident partiality of the neutral arbitrator and that a full evidentiary hearing be held on this matter. Such request was denied.

On March 14, 1980, Petitioner filed a Demand for Arbitration with the American Arbitration Association in Los Angeles, California, directed to Santa Fe. Petitioner sought to have determined the amount due him for work performed and for damages not yet computed on the lease property; and a determination of the duties owed by Santa Fe and the neutral arbitrator to him; and whether the breach of duties occurred and the effect on prior arbitration.

On January 30, 1981, the District Court entered an Order prohibiting Petitioner from proceeding with the California arbitration demand. The District Court further ordered Petitioner to dismiss his arbitration demand within fifteen days. Petitioner filed timely appeals to the Orders entered by the District Court with the Court of Appeals. The Court of Appeals affirmed the decisions of the District Court.

ARGUMENT FOR ALLOWANCE OF THE WRIT

OVERVIEW

The case at bar affords this Court the opportunity to examine the *per se* disclosure rule announced in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, *supra*, thereby resolving apparent conflict among the circuits regarding the interpretation of this rule. The case at bar also presents this Court with the opportunity to provide guidelines to the District Courts as to the circumstances under which an evidentiary hearing is required in review-

ing the adequacy of an arbitrator's compliance with the disclosure rule. The issues raised herein have enormous importance both to the nuclear industry and to the full range of commercial transactions which provide for arbitration of disputes.

I.

The Court of Appeals Has Incorrectly Interpreted and Applied the Disclosure Rule Developed in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

In *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 848, 21 L.Ed.2d 812 (1968), this Court held that an arbitration award would be set aside by reason of the failure of the arbitrator to disclose past financial dealings with a party, notwithstanding the absence of fraud or bias. Reasoning that the integrity of the arbitration process would be best served by full and frank disclosure of any dealings that might impugn the impartiality of a neutral arbitrator, the Court stated in its opinion:

> "It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties *any dealings that might create an impression of possible bias.*" (393 U.S., at 148, emphasis added)

The very language of this opinion underscores the breadth of the disclosure requirement for *"any"* dealings that *"might"* create an *"impression"* of *"possible"* bias. Given the policy advanced by this requirement, it is clear that the court's review of ar. arbitration decision on grounds of nondisclosure is subject to a standard far less stringent than that applied in cases of alleged bias where full disclosure has occurred.

In the present case, the neutral arbitrator, Dr. Mommsen, failed to disclose at any point in the proceedings that the arbitrator's client, General Atomic Company, was a partnership between Gulf Oil and Scallop Nuclear. The operations of Gulf Oil on adjacent leases became a central point in assessing the commercial viability of the uranium extraction method utilized by Petitioner. A memorandum produced at the arbitration hearing itself stated:

> "Gulf would be willing to sink the shaft at their sole cost and mine any ore at Mr. Grace's section under a contract arrangement." (Arb. Rec. p. 852)

Subsequent to the arbitration proceeding, Gulf Oil acquired leases for the property in question. The law firm representing Respondent, Santa Fe, also represented Gulf Oil. A member of that law firm submitted an affidavit evincing knowledge of Mommsen's work for Gulf. Mommsen worked for several clients of Respondent's law firm. Whether further nondisclosed dealings would have been discovered upon examination before the District Court cannot be known, for the court refused a request by Petitioner to hold an evidentiary hearing upon this matter.

The Opinion of the Court of Appeals applies to the question of disclosure the same standard for review that would be applied in cases of fraud or bias. The Court of Appeals stated in its Opinion:

> "Arbitrators are, of course, obligated to disclose possible bias. *Sanko S.S. Co., Ltd.* v. *Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973), citing to *Commonwealth Coatings* v. *Continental Casualty Co., supra.* However, it is only clear evidence of impropriety which justifies denial of summary confirmation. *National Bulk Carriers* v. *Princess Management*, 597 F.2d 819 (2d Cir. 1979). For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative. *Tamari* v. *Bache Halsey Stuart, Inc.*, 619 F.2d 1196 (7th Cir. 1980), *Cert. denied*, ... U.S. ....." (668 F.2d at 1146)

The decision of the Court of Appeals emasculates the disclosure rule announced in *Commonwealth Coatings* v. *Continental Casualty Company, supra.* No longer will it be sufficient to show failure to disclose dealings which might create an impression of possible bias. By the decision of the Court of Appeals, the party belatedly discovering the truth of the supposedly "neutral" arbitrator must now adhere to a standard heretofore reserved for an attack upon an award after full disclosure. Other circuits have applied a different standard to the question of nondisclosure. In *Sanko S.S. Co., Ltd.* v. *Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973), the Court of Appeals remanded a case for further hearing where an arbitrator had failed to disclose all dealings with a party and its counsel. The criterion for review of an arbitrator's dis-

closure of financial dealings, according to the Second Circuit, is "whether the ties are so indirect or remote that they could not reasonably create an impression of bias." Clearly, resolution of this conflict is a proper subject for action by this Court.

II.

Petitioner's Right to Due Process of Law Has Been Violated by the Refusal of the U. S. District Court and the Court of Appeals to Grant Petitioner an Evidentiary Hearing on Matters Relating to the Conduct of the Arbitration Proceeding and the Adequacy of Disclosure.

In apparent conflict with the decisions of other circuits, the Court of Appeals upheld the trial court's denial of an evidentiary hearing upon the adequacy of disclosure. The Court of Appeals concluded:

> "We hold the District Court did not err in refusing to grant an evidentiary hearing. As set forth, *supra*, we are not entitled to judge an arbitration award independently. *Campo Machinery Co., Inc., supra. The* finality of arbitration weighs heavily in its favor and and cannot be upset absent exceptional circumstances. *Fizer* v. *Safeway Stores, Inc., supra.* The Graces' contention simply fails to establish exceptional circumstances warranting the vacation of an award upon the refusal of the District Court to hold an evidentiary hearing." 668 F.2d at 1152.

The need for such a hearing became more compelling with the affidavit of a dissenting arbitrator that he had been excluded from the deliberative process. Substantial questions were raised as to the conduct of the hearing and

the adequacy of the disclosure. The due process rights available to petitioner dictated the right to pursue the truth of the matter in an evidentiary hearing. In *Sanko S.S. Co., Ltd.* v. *Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973), the Second Circuit Court of Appeals held that a corporate ship owner which had contended that an arbitrator had failed to make full disclosure with a party to the arbitration and the party's counsel was entitled to an evidentiary hearing to ascertain the full nature and extent of the relationships at issue. It is clear that the decision of the Second Circuit in permitting evidentiary hearings upon the allegation of nondisclosure is the better rule. Without evidentiary hearings as an enforcement tool, the parties are denied the opportunity to determine whether or not disclosure requirements have been met. The decision of the Second Circuit is a logical extension of the *per se* arbitration rule announced in *Commonwealth Coatings Corp.* v. *Continental Casualty Co., supra.* In *Overseas Private Investment Corp.* v. *Anaconda Co.*, 418 F.Supp. 107 (D.D.C. 1976), the issues of disclosure and evident partiality were reached only following extensive discovery. In *Cook Industries, Inc.* v. *C. Itoh & Co. (America), Inc.*, 449 F.2d 406 (2d Cir. 1971), the court refused to order an additional hearing only where it appeared from the record that the parties had adequate knowledge equivalent to disclosure. Nevertheless, Circuit Judge Oakes dissented, contending that an unresolved question of fact should be resolved by a trial court upon an evidentiary hearing.

III.

The Court of Appeals Erred in Allowing the District Court to Interfere in the Arbitration Proceedings.

The Supreme Court should take action to restrict and prohibit the interference of the U. S. District Court in arbitration proceedings and with the right of individuals to seek arbitration. The U. S. District Court for the District of New Mexico played an activist role in the initial arbitration and prohibited a second arbitration from going forward. Such interference with an administrative body is contrary to the policy and purposes of Federal Courts.

The U. S. District Court correctly determined that issues raised by Santa Fe in its Cross-Claim filed in the initial action filed by the various subcontractors were subject to arbitration. However, rather than dismissing the claims for lack of jurisdiction, the court merely stayed the proceedings before it, maintaining jurisdiction over the case while awaiting the outcome of the arbitration.

Thereafter, the District Court entered Orders regarding discovery during the arbitration process and directed that the arbitration hearing proceed despite the illness of Petitioner at the commencement of the arbitration hearings. At one point in time, the court stated that, "You can tell the arbitrators that I want them to, and I've sent this thing to arbitration and that's been forever. And I'm about to reconsider that decision. So my immediate reaction is just to abolish the stay order and say 'Let's get moving'" (transcript of findings of fact and conclusions of law on February 1, 1979). Thus the arbitration proceeded under the shadow of the District Court.

The District Court also issued an Order directing that the Petitioner dismiss a Demand for Arbitration filed in California with Santa Fe Pacific Railroad Company. The demand for arbitration had been accepted by the American Arbitration Association. The District Court asserted that it had jurisdiction to issue the subject order ". . . in aid of jurisdiction on the appeal of the judgment of this Court affirming the arbitration award previously entered in favor of Santa Fe Pacific and to preserve the status quo pending that appeal, . . ."

One of the issues presented by Petitioner in his demand for arbitration with the American Arbitration Association was the request for the Association to determine the duties owed by the neutral arbitrator to the Claimant. This would allow the Arbitration Association to make determinations on its own as to the appropriateness of actions by one of its arbitrators.

However, rather than allowing the administrative body to proceed, the District Court directed the dismissal of the arbitration demand.

The issues raised in the California arbitration proceeding were issues that had not been raised, litigated or actually judged on the merits in the prior arbitration proceeding. In order for the doctrine of collateral estoppel to apply, these matters must have occurred. See *Adolph Coors Company* v. *Commissioner*, 519 F.2d 1280 (10th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).

Basically the same test is applicable to determination of res judicata of the issues presented in the second arbitration. See *Overseas Motors, Inc.* v. *Import Motors, Ltd.*,

Inc., 375 F.Supp. 499 (D.C. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975).

Therefore, Grace submits that the District Court could not have barred the second proceeding on the grounds of res judicata or collateral estoppel. However, in any event, Petitioner submits that the District Court is required to defer to the judgment of the second arbitration panel on these issues.

The role of the courts where an agreement by its own terms calls for arbitration of disputes arising thereunder is strictly limited. The court in *Reconstruction Fnance Corp.* v. *Harrisons and Crossfield*, 204 F.2d 368 (2d Cir. 1953), *cert. denied*, 346 U.S. 854 (1953), stated that:

> "The Federal Court, in a suit seeking it to compel arbitration, should . . . deal with no issues except (1) the making of an agreement to arbitrate and (2) the failure, neglect or refusal of the other party to perform that agreement." 204 F.2d at 368.

This principle of judicial deference to arbitration is also recognized in *Hanes Corp.* v. *Millard*, 531 F.2d 585 (D.C. Cir. 1976), where the court, holding that the Statute of Limitations issue was encompassed within the arbitration clause, stated:

> "We start from an accepted premise that, after determining the existence of a valid and enforceable agreement that extends to the dispute at hand, courts should not play a broad role in denying effect to agreements to arbitrate." 531 F.2d at 598.

In view of these principles and the recognized policy of the Federal Courts not to interfere with administrative

bodies, it is submitted that the Supreme Court should take action to restrict and prohibit the interference of District Courts in arbitration proceedings.

IV.

Solution Mining Is a Viable Method of Producing Uranium-Bearing Ore in Commercial Quantities.

In the public interest, the Court should recognize solution mining as a viable method of achieving commercial production of uranium ore.

The principal issue before the arbitration panel was whether or not Petitioner was entitled to a renewal of the subject leases under the term of the leases providing that "Lessor agrees that if during the term of this lease and agreement Lessee has found and, at the expiration of the term of this lease, is producing uranium-bearing ore in commercial quantities from the lease premises, Lessor will . . . renew this lease and agreement for an additional three (3) year period . . ."

Rather than use conventional mining techniques, Petitioner had achieved production of uranium by the use of solution mining. However, the arbitration panel and District Court did not consider production by solution mining as a method of producing uranium-bearing ore in commercial quantities and thus ruled that Petitioner was not entitled to renewal of the leases. Substantial testimony on the solution mining technique and production in commercial quantities was presented to the arbitration panel.

Apparently, there are no specific judicial interpretations of the term "commercial quantities" in a uranium lease

situation. However, the Utah Supreme Court has stated that a "prudent man" test would be used to determine if a commercial quantity of uranium ore has been discovered. In *Rummell* v. *Bailey*, 320 P.2d 653 (Utah, 1958), the court determined that the test would be whether the party would pursue the ore vein and expend further time, effort or money in attempting to develop the property as a mine. It is not necessary that production immediately pay mining expenses.

Some oil and gas leases have used the term "commercial quantities." The term has been defined as "a quantity of oil, gas or other minerals sufficient for production in paying quantities." See *William & Meyers Manual of Oil and Gas Terms, Annotated*, p. 89 (1980), and *Texaco, Inc.* v. *Fox*, 618 P.2d 844 (Kan. 1980). Oil and gas cases have construed paying production to constitute revenue in excess of lifting costs. The costs of drilling and equipping are excluded from this calculus. Annotation, "Meaning of Paying Quantities in Oil and Gas Leases", 43 A.L.R.3d 8; *Stewart* v. *Amerada Hess Corp.*, 604 P.2d 854 (Okla. 1979).

The Federal Energy Regulatory Commission, in interpreting its regulations developed under the Natural Gas Policy Act of 1978, in 18 C.F.R. § 271.204(e), concluded that production in commercial quantities has occurred if natural gas has been sold and delivered from such reservoir.

It is undisputed that Petitioner made sales of uranium-bearing ore in the form of yellow cake, or uranium solution. However, because of an apparent prejudice against or refusal to acknowledge solution mining as a method of production, the arbitration panel failed to find that Petitioner was entitled to renewal of the subject leases.

This failure on the part of the lower courts and the arbitrators is contrary to the public interest. The energy needs of this country are profound, and freedom to develop all sources of energy is essential to the continued success of this country. However, the uranium industry is severely depressed today, resulting in lack of development of this energy source and widespread unemployment in the southwestern United States. Entrepeneurs such as the Petitioner should not be prohibited from developing the uranium industry by restricted court interpretations regarding commercial production. They should be given the freedom and opportunity to develop uranium as a natural resource.

It is thus in the public's best interest that this Court recognize solution mining as a viable method of achieving commercial production within the uranium industry. Failure to do so will contribute to the continued depression of the uranium industry contrary to the public interest.

CONCLUSION

For the reasons set forth herein, Petitioner prays that a Writ of Certiorari issue.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Writ of Certiorari on other parties in this proceeding by causing on the 23rd day of June, 1982, three (3) true and correct copies thereof to be mailed first class, postage prepaid, to:

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William B. Rogers

APPENDICES

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed January 14, 1982]

ORMSBEE DEVELOPMENT COMPANY, a Wyoming corporation, Plaintiff,	)	
v.	)	
	)	Nos. 80-1750,
CORRINE GRACE and MICHAEL P. GRACE,	)	80-1803 and
Defendants-Cross Defendants-Appellants,	)	81-1161
v.	)	
SANTA FE PACIFIC RAILROAD, Defendant-Cross Claimant-Appellee.	)	

Appeal From the United States District Court
For the District of New Mexico
(D.C. Nos. 76-326 HB, 77-148, 77-149 and 77-150)

Gary W. Davis (William E. Dakan with him on the brief) of Martin, Pringle, Fair, Davis & Oliver, Wichita, Kansas (William E. Snead of Ortega and Snead, Albuquerque, New Mexico, with him on the brief), for Corrine Grace.

Martha Mansell Eskin, Culver City, California, and F. Kimball Joyner, Jr. of Jones, Meilkejohn, Kehl & Lyons, Denver, Colorado (Walter L. Reardon, Jr., Albuquerque, New Mexico, with them on the brief), for Michael P. Grace.

John R. Cooney and Ruth M. Schifani (Peter J. Adang with them on the brief) of Modrall Sperling Roehl Harris & Sisk, Albuquerque, New Mexico, for Santa Fe Pacific Railroad.

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges.

BARRETT, Circuit Judge.

These consolidated appeals challenge a final judgment of the District Court confirming an arbitration award and an order prohibiting proceeding on an arbitration demand.

In June 1968, Michael P. Grace (Michael) purchased six options from Santa Fe Pacific Railroad (Santa Fe) on property owned by Santa Fe believed to contain uranium-bearing ores in the Grants, New Mexico, area. Each option afforded Michael a three year period within which exploration work could be conducted, after which Michael had the option to enter into a uranium mining lease with Santa Fe.

In 1971 Michael exercised his options and entered into several uranium leases with Santa Fe. Each lease provided in part:

> Lessor agrees that if during the term of this lease and agreement Lessee has found and at the expiration of the term of this lease is producing uranium-bearing ore in commercial quantities from the leased premises, Lessor will, upon written request . . . renew this lease and agreement . . . upon the same terms and conditions . . .
> [App. at p. 131].

Each lease also provided:

> Lessee shall not subject Lessor or the leased premises to any liability or lien for or on account of any work done . . . upon said premises, and if by reason of the failure of Lessee to pay bills or expenses incurred by Lessee, any lien or liens shall be filed against the

> leased premises . . . Lessor may also at its election declare a forfeiture of this Lease and Agreement.
> [App. at pp. 127-128].

Each lease further provided that:

> Any dispute between the parties under this agreement shall be referred to arbitration, each party selecting one arbitrator and the American Arbitration Association designating the third arbitrator. The award of the arbitrator shall be final and binding on the parties hereto.
> [App. at p. 132].

Michael thereafter embarked on an exploration and mining program in accordance with his leases. In conjunction with his activities, substantial uranium reserves were discovered, albeit of a relatively low grade, located 3,000 to 5,000 feet underground. Subsequently, as the expiration date of the leases approached, Michael, in an effort to achieve production and retain the leases, turned to "solution mining". Solution mining is a process by which chemicals are injected into the ground, allowed to remain in uranium-bearing rock formations a short time, and then pumped to the surface with the hope of recovering U_3O_8 from the processing uranium suspended in the solution. By proceeding in such a manner, Michael, was, allegedly, "successful in producing significant quantities of uranium-bearing solution from his operations." [Appellants' Brief at p. 6].

On November 26, 1975, twelve days prior to the expiration date of the principal term of the leases, Michael's operations were shut down when the Environmental Improvement Agency of the State of New Mexico obtained an injunction against him for failure to obtain a permit. Michael subsequently became involved in the renewal of his leases and his solution mining operations were not resumed.

On June 2, 1976, Ormsbee Development Company, a drilling subcontractor, filed suit against Michael and his wife, Corrine, as lessees, and Santa Fe, as owner of the properties, seeking to foreclose on mechanics' liens which it had filed after Michael had failed to pay it for drilling and exploration work. Other subcontractors intervened or filed companion cases, all of which were consolidated with the Ormsbee claims. These disputes were ultimately settled and the complaint dismissed.

Santa Fe, however, filed an original, and, on February 10, 1977, an amended cross claim against Michael seeking a determination that all his rights and interests "and all rights and interests of anyone holding or claiming to hold any interest in the leasehold estates at one time existing in Michael P. Grace" had terminated by reason of his failure to achieve production of uranium-bearing ore in commercial quantities as required by the leases. Santa Fe also alleged a breach of the leases amounting to a forfeiture by allowing the filing of the lien claims.

Prior to Santa Fe filing its amended cross claim, Michael, on July 19, 1976, filed a demand for arbitration with the Phoenix Regional Office of the American Arbitration Association seeking to declare his leases valid and in full effect. In March of 1977, the law firm of Kantor and Carmody entered its appearance for Michael and Corrine in federal district court, and thereafter, on April 11, 1977, filed a motion on behalf of Michael and Corrine for stay of proceedings on Santa Fe's cross claim pending arbitration.

On July 5, 1977, the District Court herein entered an order directing that Michael and Corrine would not be required to file an answer to Santa Fe's cross claim pending arbitration. On the same day, the Court also entered an order, dismissing with prejudice, Santa Fe's motion requesting an injunction enjoining Michael from proceeding with arbitration "for the reason that that question is now moot as a result of the Court's ruling, filed herein, granting De-

fendants', Michael P. Grace II and Corrine Grace's motion to stay proceeding pending arbitration." [App. at p. 377]. This order bore the caption "Approved and Stipulated To Prior To Submission To The Court" and was executed by "Kantor and Carmody P.A." as "Attorneys for Michael P. Grace II and Corrine Grace."

The arbitration process thus commenced with Michael and Santa Fe each selecting an arbitrator and the American Association of Arbitrators (Association) selecting a third neutral arbitrator, one Dr. Jack T. Mommsen (Mommsen). An arbitration evidentiary hearing conducted under the auspices of the Association began on April 17, 1979, and ended some two and one-half weeks later on May 1, 1979.

On June 27, 1979, the arbitrators, with one member dissenting, entered their award, holding that the leases had "expired under the terms and on the termination dates defined in the leases", that "the leases are not valid", and that "all rights and interests of Grace in the leases are terminated."

On July 3, 1979, Santa Fe filed a motion to confirm the award of the arbitrators. On September 25 and 26, 1979, Michael and Corrine, respectively, filed separate motions to vacate or set aside or modify the arbitration award.

Within her motion, Corrine alleged, *inter alia*, that: the leases were community property, and that she had a one-half interest in them and that she therefore should have been a named party to the arbitration; there was evident partiality on the part of the neutral arbitrator; and that William Condren, her husband's attorney, had a conflict of interest which should have prohibited his firm acting as counsel in the arbitration proceeding. Within his motion, Michael alleged, as had Corrine, the issue of the community property nature of the leasehold interests and the evident partiality of the neutral arbitrator. Michael also alleged that a substantial amount of relevant evidence was improperly excluded by the arbitrators, that the de-

cision making process of the arbitrators was not proper, and that a continuance on the hearing should have been granted due to his health.

On April 1, 1980, the District Court entered its opinion confirming the arbitration award in favor of Santa Fe. In so doing the Court found/concluded, *inter alia*: for purposes of resolving the motions, the leases are assumed to be community property; Corrine's attorney objected to Santa Fe's request that Corrine be made a formal party to the arbitration proceeding because Corrine had not signed an arbitration agreement; at issue is whether a single spouse can participate in a proceeding affecting community real property, employ counsel and direct the litigation without the joinder of the other spouse — that the question is a management question; under the law of New Mexico, Corrine is bound by the management actions of Michael; the claim of evident partiality arose from the alleged connections between Mommsen and the Modrall law firm which represented Santa Fe; the alleged connections included the fact that Mommsen's active clients included General Atomic Company, which is a partnership between Gulf Oil and Scallop Nuclear, and that the Modrall firm which represents Santa Fe also represents Gulf Oil; the alleged connections giving rise to evident partiality also included Mommsen's work for Texas Eastern Nuclear, a subsidiary of Texas Eastern Company and that the Modrall firm represents Transwestern Pipeline Company, another subsidiary of Texas Eastern Company; Mommsen was being considered as an arbitrator in a case with Homestake Mining Company, which was also represented by the Modrall firm; Mommsen sent Grace's attorney, Dinsmore Adams a copy of his resumé wherein he (Mommsen) related his connections with General Atomic, Texas Eastern Nuclear, and Homestake Mining but did not mention Gulf Oil or the Modrall firm; under *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), an arbitrator's failure to disclose non-trivial relationships with parties is

grounds for vacating an arbitration award regardless of any actual bias, prejudice, or unfairness; Mommsen complied with his obligation under *Commonwealth Coatings*; the Modrall firm would be under the same obligation of disclosure except when, as here, there is no evidence that the Modrall firm was made aware of the relationship at issue and thus the occasion for its disclosure never arose; the alleged conflicts of interest of William Condren as Michael's attorney, even if true, would not be grounds for vacating the arbitration award; the rulings of the arbitrators *vis-a-vis* the admissibility and applicability of certain leases proffered by Michael, the distinction made between leases with automatic renewal provisions as opposed to renegotiated renewals, and the arbitrators' exclusion of the KSN lease, were not clearly erroneous nor an abuse of discretion; Michael Grace's assertions that the arbitrator chosen by him, Mr. George Cutler, was denied an opportunity to fully participate in the decision making process, even if true, does not warrant vacation of the arbitration award; and that Michael Grace's contentions that the award should be set aside because he was forced to go to arbitration at a time when he was recovering from surgery and could not attend the entire arbitration hearing is completely without merit when, as here, Grace did appear during the course of the hearings and was allowed to testify on his own behalf.

The District Court concluded that none of the arguments advanced by Michael or Corrine were well taken and appeared "to be yet one more attempt to avoid the consequences of an arbitration upon which they insisted." The District Court also directed the entry of a separate order confirming the arbitration award.

Thereafter, Corrine filed a motion, adopted and joined in by Michael, for reconsideration of the April 1, 1980 opinion and order confirming the arbitration award. In support of this motion Corrine filed an affidavit executed by Mark Thompson, a partner in the Modrall law firm,

wherein Thompson acknowledged: attending a lecture that Mommsen had given for General Atomic; becoming aware through a conversation with an associate that Mommsen was the neutral arbitrator in the case at hand; and that at no time prior to April 1, 1980 did he ever discuss in detail his awareness of Mommsen's relationship with General Atomic with any members of the firm working on the arbitration.

On May 15, 1980, the District Court entered a memorandum opinion upholding its opinion of April 1, 1980, noting that "The opinion . . . will not be amended, except as supplemented herein . . ." Within its second opinion the District Court held, *inter alia*: Thompson's affidavit did not warrant reversing the Court's prior ruling on the lack of evident partiality; Corrine was represented by counsel during the course of the arbitration; and Mommsen's prior dealings with General Atomic and his continuing contact with it was not in violation of *Commonwealth Coatings, supra.*

On May 23, 1980, the District Court entered the judgment in favor of Santa Fe Pacific in accordance with its opinions of April 1 and May 15, 1980. Within its judgment the Court ordered that the Graces had no interest in the Santa Fe leases; the leases terminated as of the termination date set forth in each lease; Michael was obligated to perform any outstanding leasehold obligations which survived the expiration of the leases; Michael was obligated to indemnify Santa Fe against any judgments against it in favor of any lien claimants for work done for Michael on the leases; Michael was to pay Santa Fe $2,465.32 for costs of the arbitration proceeding; and that Santa Fe's cross claims against the Graces were deemed merged with the judgment and to the extent such claims were not awarded by the arbitrators the same were dismissed with prejudice.

On August 6, 1980, Corrine filed a motion with this Court for certification requesting that we certify to the

Supreme Court of New Mexico the question of whether a person's community property interest in New Mexico real property can be terminated in an arbitration or other legal proceeding to which such person was not made a party. Michael joined therein pursuant to his motion for a stay of proceedings and motion for an extension of time to file a docketing statement. On September 18, 1980, we denied the motions for certification and stay but permitted the request for certification to be renewed and presented on appeal proper.

On March 14, 1980, Michael filed a demand for arbitration with the American Arbitration Association in Los Angeles, California, directed to Santa Fe. Within this demand, Michael sought to have determined: the amount due him for work performed and for damages not yet computed; and a "determination of the duties owed by Santa Fe and neutral arbitrator" to him and "whether the breach of duties occurred", and "[the] affect on prior arbitration". Michael also requested leave to amend to allege further damages when ascertained.

After the demand for arbitration was served on Santa Fe it filed a "Motion to Stay Arbitration and for Order to Show Cause" in the United States District Court for the District of New Mexico, the same court which had previously confirmed the arbitration award in favor of Santa Fe. Within its motion, Santa Fe asserted that the issues involved in the arbitration in California were identical to those issues considered in the New Mexico arbitration proceedings.

On January 30, 1981, the District Court entered an order prohibiting Michael from proceeding with the California arbitration demand. The District Court further ordered Michael to dismiss his arbitration demand within fifteen (15) days.

On appeal in No. 80-1803 Michael contends: (1) The question of whether a person's community property interest in New Mexico real property may be terminated in an

arbitration proceeding to which such person was not made a party should be certified to the Supreme Court of New Mexico; (2) The arbitration award should be vacated in view of the arbitrator's refusal to hear evidence on the construction of the lease language "production of uranium-bearing ore in commercial quantities"; (3) The arbitration award should have been vacated because of the evident partiality of the neutral arbitrator; and (4) The trial court should have granted discovery and an evidentiary hearing on matters relating to the conduct of the arbitration proceeding.

On appeal in No. 80-1750 Corrine contends: (1) The issue of termination of her community property interest should be certified to the Supreme Court of New Mexico; (2) The District Court erroneously confirmed the arbitration award in light of the failure of the neutral arbitrator and the law firm representing Santa Fe to disclose significant conflicts of interest; (3) The Court erred in denying discovery and an evidentiary hearing on the question of conflicts of interest; and (4) Whether the award should be vacated in view of the majority's failure to hear or consider the views of the arbitrator selected by Michael and the panel's exclusion of significant evidence.

On appeal in No. 81-1161 Michael contends: (1) The District Court acted beyond its jurisdiction in entering the order prohibiting him from proceeding with the California arbitration request; (2) The issues to be arbitrated in the California arbitration proceeding are not barred by res judicata or collateral estoppel; and (3) The District Court should have deferred to the California arbitration demand.

I.

At the outset we deem it important to set forth the parameters governing our review.

Once it has been established that the parties had entered into a binding agreement to arbitrate, the entire con-

troversy, including the validity [and essence] of the disputed contract must be referred to arbitration. *Muh* v. *Newberger, Loeb & Co., Inc.*, 540 F.2d 970 (9th Cir. 1976). Parties who agree to submit matters to arbitration are presumed to agree that everything, both as to law and fact, necessary to render an ultimate decision is included in the authority of the arbitrators. *Continental Materials Corporation* v. *Gaddis Mining Company*, 306 F.2d 952 (10th Cir. 1962). Doubts are to be resolved in favor of arbitrability. *Oil, Chemical & Atomic Workers* v. *American Oil Company*, 528 F.2d 252 (10th Cir. 1976). Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances. *Fizer* v. *Safeway Stores, Inc.*, 586 F.2d 182 (10th Cir. 1978).

A party attacking the legality of an arbitration award provided for within a contract has the burden of sustaining such an attack. *Wright Lumber Company* v. *Herron*, 199 F.2d 446 (10th Cir. 1952). Courts are, expectedly, justified in exercising great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy and inexpensive process of arbitration, freely chosen by the parties. *Andros Compania Martina* v. *Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978). Furthermore, arbitration awards generally need not delineate reasons or reasoning, at least when the grounds for the award may be gleaned from the record. *Farkar Co.* v. *R. A. Hanson DISC, Ltd.*, 604 F.2d 1 (2d Cir. 1979).

A court, therefore, is not entitled to judge an arbitration award independently. *Campo Machinery Co. Inc.* v. *Local Lodge No. 1926*, 536 F.2d 330 (10th Cir. 1976). Arbitrators are, of course, obligated to disclose possible bias. *Sanko S.S. Co. Ltd.* v. *Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973), *citing to Commonwealth Coatings* v. *Continental Cas. Co., supra*. However, it is only clear evidence of impropriety which justifies the denial of summary confirmation of an arbitration award. *National Bulk Carriers*

v. *Princess Management*, 597 F.2d 819 (2d Cir. 1979). For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative. *Tamari* v. *Bache Halsey Stuart, Inc.*, 619 F.2d 1196 (7th Cir. 1980), *cert. denied*, ___ U.S. ___.

Finally, we deem it important to observe that the right to arbitration, like any other contract right, can be waived. *Reid Burton Construction Inc.* v. *Carpenters District Council, Etc.*, 614 F.2d 698 (10th Cir. 1980), *cert. denied*, ___ U.S. ___; *Commercial Iron & Metal Co.* v. *Bache Halsey Stuart, Inc.*, 581 F.2d 246 (10th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979).

Within these general guidelines, we shall now proceed to consider and address the appellate contentions advanced by the Graces.

II.

Michael and Corrine, individually, within their respective appellate briefs, contend that Corrine's interest in New Mexico real property, i.e., the leases, was improperly terminated in the arbitration proceeding inasmuch as she was not made a party thereto. The Graces further contend that this Court should certify the question of whether a person's community property interest in New Mexico real property may be terminated in an arbitration proceeding or other legal proceeding to which such person was not made a party. We hold that these contentions are without merit. A review of the pleadings filed herein establishes that Corrine, although not a formal, named party to the arbitration proceedings, was definitely in fact and in law a party thereto.

As noted, *supra*, this action was commenced on June 2, 1976 when Ormsbee filed suit against Michael and Corrine and Santa Fe seeking to foreclose on certain mechanics' liens for work performed on the subject leases. Thereafter,

on November 26, 1976, the firm of Lamb, Metzgar, Franklin & Lines entered an appearance as counsel for Michael and Corrine. Subsequently, on March 9, 1977, the Lamb firm withdrew as the Graces' attorneys and the firm of Kantor and Carmody entered its appearance as their attorneys.

Thereafter, the Kantor firm filed numerous pleadings on behalf of Michael *and* Corrine, including: An April 11, 1977 motion for a stay of proceedings on Santa Fe's crossclaim alleging "that both federal and state law require a stay of proceedings until arbitration is completed"; a July 15, 1977 motion to stay proceedings in several cases related to the Ormsbee action, alleging, as grounds, that the court had already stayed Santa Fe's crossclaim "pending arbitration of the issues between it [Santa Fe] and Michael P. Grace and Corrine Grace"; a January 31, 1979 motion for a protective order alleging, as grounds, "the pending arbitration of the issues between Santa Fe Pacific Railroad Company and Michael P. Grace II and Corrine Grace." Notwithstanding these motions, in which Michael *and* Corrine requested relief pending arbitration between Santa Fe and Michael *and* Corrine, Corrine's attorney objected to Santa Fe's request that Corrine be made a formal party, inasmuch as she had not signed an arbitration agreement.

The inherent inconsistency with which both Michael and Corrine utilized the pending arbitration proceedings "between it [Santa Fe] and Michael P. Grace and Corrine Grace" and their subsequent attempts to cause the arbitration award to be vacated because it allegedly improperly terminated Corrine's property interest in the leases via the arbitration proceeding to which Corrine was allegedly not a party, was well summarized by the District Court:

> . . . To the extent that the above conclusions rely in any way on statements made by Mr. Dinsmore Adams, the Court finds absolutely no merit in the claim that he did not represent Corrine Grace. The

> affidavit of Elvin Kantor, who was local counsel for Mr. Adams, does not change the situation. The file is replete with claims and representations by Mr. Kantor and Mr. Adams that they were appearing for both Michael and Corrine Grace. Through his affidavit Mr. Kantor has put himself in the unfortunate position of either having misrepresented to the Court who his clients were for some 24 months or having filed a misleading affidavit. Neither position comports with the Code of Professional Responsibility. The Court is completely satisfied that the statements attributed to Mr. Dinsmore Adams, to the extent that they are at all relevant, were made at the time that he represented Corrine Grace, and that the actions of Elvin Kantor, to the extent also that they are at all relevant, were taken on behalf of both Michael and Corrine Grace.
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> May 15, 1980 Memo Opinion at p. 3.

We hold that the District Court correctly found that Corrine, although not a formal party to the arbitration proceeding by her own choosing, was, indeed, a party to the proceeding and represented by counsel throughout.

Assuming, *arguendo*, that Corrine was not a party to the arbitration proceeding, the Graces' allegations that her community property interest in New Mexico real property was improperly terminated by an arbitration or other legal proceeding to which she was not a party would remain, in the final analysis, without merit.

It is uncontested that both Michael and Corrine repeatedly sought and received stays predicated upon their *joint* motions that actions be stayed pending the arbitration proceeding between Santa Fe and themselves. It is also uncontested that: the arbitration request, filed by Michael, sought "to declare the leases valid and in full effect"; the arbitration clause within the leases provided

that "[t]he award of the arbitrator shall be final and binding on the parties hereto"; and that the arbitrators found that the leases "expired under the terms and on the termination dates defined in the leases". Under these uncontested circumstances, Corrine cannot, at this late date, argue that her property interests were improperly terminated. Michael and Corrine repeatedly sought relief predicated on pending arbitration, which by its very terms was to be final in nature. The arbitration they so actively sought was accorded them. Thus, we will not set aside the arbitration award on the specious argument that Corrine's property interest was improperly terminated. As the District Court observed:

> In conclusion the Court finds that some of the arguments made by either Corrine or Michael Grace are well taken. They appear to be yet one more attempt to avoid the consequences of an arbitration upon which they insisted. Perhaps arbitration seems less attractive now, but that does not entitle them to a second chance.
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> April 1, 1980 Memo Opinion at p. 14.

In view of our holding that, although Corrine was not a formally named party to the arbitration proceeding, she was in law and fact a party thereto from its inception to termination, we need not further discuss whether Corrine's interest in New Mexico community real property was allegedly improperly terminated in a proceeding to which she was not made a party. This is so because the interests of Michael and Corrine expired on the termination dates defined in the respective leases and not by virtue of a "transfer".

Similarly, we need not address the Graces' contention that certification to the Supreme Court of New Mexico is appropriate herein. It is sufficient to observe that certification to the Supreme Court of New Mexico is not appropriate when, as here, the issue certified would not be de-

terminative of the issues before us on appeal. *See* N.M. Stat. Ann. § 34-2-8 (1978). Certification is, and must remain, a discretionary function of the federal court, to be utilized, when available, to determine unsettled questions of state law. *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974); *Imel* v. *United States*, 523 F.2d 853 (10th Cir. 1975). It is to be utilized with restraint and distinction. *State of Florida* v. *Exxon Corporation*, 526 F.2d 266 (5th Cir. 1976), *cert. denied*, 429 U.S. 929 (1976), *citing to Barnes* v. *Atlantic & P. Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975).

In light of our holding that Corrine was not deprived of her community property interest in a proceeding to which she was not a party, the certification argument is not viable.

III.

The Graces contend the District Court erroneously confirmed the arbitration award in spite of the evident partiality of the neutral arbitrator, Mommsen. They contend that the award should have been vacated under the New Mexico Arbitration Act, N.M. Stat. Ann. § 44-7-12(A)(2) which directs vacation of an award where "there was evident partiality by an arbitrator appointed as a neutral" and Rule 18 of the American Arbitration Association which requires the disclosure by a prospective arbitrator of any circumstances likely to create an impression of bias which he believes might disqualify him as a prospective arbitrator.

The Graces argue that although Mommsen disclosed that he had engaged in consulting work for General Atomic, they were not aware that Mommsen also worked for Gulf Oil, which owned 50% of General Atomic. The Graces deemed this significant inasmuch as Gulf Oil eventually purchased the subject mining properties from Santa Fe on September 14, 1979. Further, the Graces allege that they were not aware that the Modrall firm which represented Santa Fe, also represented General Atomic and Gulf Oil.

The Graces allege that Mommsen's nondisclosure, coupled with the Modrall firm's nondisclosure are fatal to the arbitration award.

In addressing this issue, the District Court observed within its April 1, 1979 order:

> The claim of evident partiality arises from the alleged connections between Dr. Mommsen and the Modrall law firm, including the fact that Dr. Mommsen had done consulting work in the past and had as an active client at the time of his selection the General Atomic Company, which is a partnership between Gulf Oil and Scallop Nuclear, and that the Modrall firm represents Gulf Oil. Further it is claimed that Dr. Mommsen did work for Texas Eastern Nuclear, a subsidiary of Texas Eastern Company and that the Modrall firm represents Transwestern Pipeline Company, another subsidiary of Texas Eastern Company. Finally it is claimed that there was evident partiality in that Dr. Mommsen was being considered as an arbitrator in a case involving Homestake Mining Company, which company is represented by the Modrall firm.

The District Court then found:

> The United States Supreme Court has stated that the arbitration process is subject to the "simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 149 (1968). This has been found to be a per se rule in that failure to disclose non-trivial relationships with parties will be grounds for vacating an arbitration award regardless of any actual bias, prejudice, unfairness or lack of the same in the hearing. In this case it is perfectly clear that Dr. Mommsen fully complied with his obligation un-

der *Commonwealth Coatings, supra,* and all rules of the AAA.

April 1, 1980, Memo Opinion at pp. 7-8.

The District Court reached a similar conclusion in its May 15, 1980 opinion after Mark Thompson, a partner in the Modrall firm submitted an affidavit, in which he acknowledged, *inter alia,* that he had attended a lecture which Mommsen had given for General Atomic and had become aware that Mommsen had been selected as the neutral arbitrator in the course of a conversation with an associate of the Modrall firm. We hold that the District Court properly found that the Graces did not establish evident partiality.

. As discussed, *supra,* only clear evidence of impropriety justifies the denial of summary confirmation of arbitration awards. *National Bulk Carriers* v. *Princess Management, supra.* In order to set an award aside, the evidence of bias or interest of an arbitrator must be direct and definite and capable of demonstration. *Tamari* v. *Bache Halsey Stuart, Inc., supra.*

As the District Court observed, the Supreme Court in *Commonwealth Coatings Corp.* v. *Continental Casualty Co., supra,* delineated the disclosure requirement of potential arbitrators:

> . . . Since in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of "evident partiality" or the use of "undue means." See also *Rogers* v. *Schering Corp.,* 165 F.Supp. 295, 301 (D. C. N. J. 1958). It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators

than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

393 U.S. at pp. 148-149.

The nondisclosure complained of by the Graces does not fall within the impartiality commands of *Commonwealth, supra.* The core of their complaint is that Mommsen and the Modrall firm had similar clients. The Graces would apparently request that potential neutral arbitrators "sever all their ties with the business world". Such is not the law. As Justice White observed in concurring with the majority in *Commonwealth, supra:*

> While I am glad to join my Brother BLACK's opinion in this case, I desire to make these additional remarks. The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. Cf. *United States Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.
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> * * * *

> . . . This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. . . . The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.
>
> 393 U.S. at pp. 150-151.

Mommsen was not financially involved with either the Graces or Santa Fe. The fact that he and the Modrall firm had similar clients is of no moment herein, particularly in view of his disclosures that he had engaged in consulting work for General Atomic.

IV.

The Graces contend the District Court should have granted an evidentiary hearing on matters relating to the conduct of the arbitration proceeding which were outside the arbitration record. This contention reiterates the alleged potential prejudicial relationship between Mommsen and the Modrall firm *vis-a-vis* clients common to both and further incorporates the alleged exclusion of Michael's arbitrator, George Cutler, from the decision making process.

In addressing this allegation, the District Court found:

> The second ground for vacating the arbitration award urged by Michael Grace is his contention that the arbitrator chosen by him, Mr. George Cutler, was denied an opportunity to fully participate in the decision making process. In support of this claim, Michael Grace has submitted the affidavit of Mr. Cutler which states that he was
>
> > affectively [sic] denied a right to expect that all arbitrators would participate in the deter-

> mination of the award as the arbitrator selected by the claimant was not given a sufficient opportunity to express his views, argument and reasoning behind his opinion and beliefs with respect to the merits of the claimant's position.

He claims that when he arrived at the final meeting of the arbitrators in San Francisco, Dr. Mommsen immediately stated his decision, which was favorable to the Santa Fe Pacific, and that this was then immediately concurred in by Mr. Jennings, the arbitrator chosen by the railroad. At this point, Cutler states that he felt "the decision-making process was, for all intents and purposes, concluded" and that he did not have a chance to express his views. Though the Santa Fe Pacific has filed an affidavit from Mr. Jennings controverting these allegations, the Court will assume, for the purposes of resolving this issue, that Mr. Cutler's affidavit is true. Even in this situation the Court concludes however that there was no misconduct warranting vacating of the arbitration award.

In the case of *Artie Shaw Presents, Inc.* v. *Snyder*, 362 N.Y.S.2d 158 (1974), a strikingly similar claim was made by the arbitrator chosen by the losing party. There it was alleged in a conclusory affidavit from the disgruntled arbitrator that he was "deprived of any meaningful opportunity to deliberate upon the issues with [his] co-arbitrators." 362 N.Y.S.2d at 159. There was no evidence in that case, as there is none in this case, that any arbitrator was excluded from any proceedings by the others or that all were not present for the taking of the evidence. The only exclusion of the complaining arbitrator in *Artie Shaw, supra*, was to his own refusal to discuss the case with the other two arbitrators on the telephone. The New York court concluded that

> . . . although it is desirable to have all of the arbitrators meet, following final submission of the controversy and participate in the deliberations so that the parties to the dispute may have the benefit of the effect the views and arguments of each arbitrator might have upon the others, the presence of all is not required.

362 N.Y.S.2d at 159.

> There is no evidence in this case that any meetings or consultation were had in secret, intentionally excluding Mr. Cutler, as was the situation in *Jones* v. *Bishop*, 218 Ill. App. 318 (1920), relied upon by Michael Grace. Nor is there any misconduct such as in *Blin* v. *Hay*, 2 Tyler [Vt.] 304 (1803), where two of the arbitrators were not notified of the meeting, let alone present. The Court can find no grounds for setting aside the arbitration award on this issue.

April 1, 1980 Memo Opinion at pp. 11-12.

We hold the District Court did not err in refusing to grant an evidentiary hearing. As set forth, *supra*, we are not entitled to judge an arbitration award independently. *Campo Machinery Co., Inc., supra.* The finality of arbitration weighs heavily in its favor and cannot be upset absent exceptional circumstances. *Fizer* v. *Safeway Stores, Inc., supra.* The Graces' contention simply fails to establish exceptional circumstances warranting the vacation of the award upon the refusal of the District Court to hold an evidentiary hearing.

V.

In No. 81-1161 Michael contends that the District Court erred in prohibiting him from proceeding with his California arbitration request.

As set forth, *supra*, within his request Michael sought the amount due him for work performed and for damages

not yet computed, a determination of the duties owed by Santa Fe and the neutral arbitrator, and a determination of whether a breach of such duties occurred and their effect on the prior arbitration. Within its motion to stay Michael's arbitration request, Santa Fe argued that an arbitration proceeding on the same request had already been concluded, that the arbitration award entered was res judicata as to Michael's California arbitration demand, and that the court had jurisdiction to stay the arbitration request in aid of the appeal of the judgment on the order affirming the arbitration award pending before this Court.

In its order granting Santa Fe's motion to stay Michael's California arbitration request, the District Court simply observed that it was staying the request in aid of jurisdiction on the appeal and to preserve the status quo pending that appeal.

The District Court clearly had jurisdiction over Michael to decide matters in aid of the appeal from its judgment. In *Silverthorne* v. *Laird*, 460 F.2d 1175 (5th Cir. 1972) the court held:

> In short, we subscribe to the following analysis of the rule against district court activity subsequent to the taking of an appeal:
>
> > "In general, the district court should have full authority to take any steps during the pendency of the appeal that will assist the court of appeals in the determination of the appeal. Restrictions on the power of the district court that are grounded in nothing more than the technical consideration that jurisdiction 'passes' from it upon the filing of the notice of appeal are impractical and unwise. Dictum in Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n (CA3d, 1966) 365 F2d 295, rev'd on other grounds (1967); 389 US 64, 88 SCt 201, 19 L ed2d 236, to the effect that the filing of a

> notice of appeal on the day judgment was entered and before the trial court had entered findings of fact and conclusions of law precluded the court from entering such findings is an example of a technical application of the general rule which serves no useful purpose."
>
> 9 Moore's Federal Practice ¶203.11 n. 2.
>
> 460 F.2d at pp. 1178-1179.

The same standard is applicable here.

Even were we to assume, which we do not, that the District Court did, in fact, as Michael contends, lack jurisdiction to enter the order, the general law of arbitration would, in and of itself, preclude Michael from going forward with the California arbitration request. As discussed, *supra*, the finality of arbitration weighs heavily in its favor. *Fizer, supra.* Courts are not empowered to judge an arbitration independently. *Campo Machinery Co. Inc., supra.* Perhaps more importantly, however, is the rule that the right to arbitration, like any other contract right, can be waived. *Reid Burton Construction, Inc., supra.* In *Reid Burton* we observed:

> However, the right to arbitration, like any other contract right, can be waived. *Cornell & Copany* v. *Barber & Ross Company,* 123 U.S.App.D.C. 378, 360 F.2d 512, 513 (D.C. Cir.), *aff'g.* 242 F.Supp. 825 (D.D.C.). There is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding by the trier of the facts. *Burton-Dixie Corp.* v. *Timothy McCarthy Const. Co.,* 436 F.2d 405, 408 (5th Cir.).
>
> 614 F.2d at p. 702.

Recognizing that there "is no set rule" as to what constitutes a waiver of one's arbitration rights, we hold that

Michael's right to arbitrate those requests set forth within his California arbitration demand, were waived to the extent that they were not addressed in the course of the first arbitration proceeding, by virtue of Michael's failure to advance such requests. In the final analysis, Michael's California arbitration request appears "to be yet one more attempt" to circumvent "the consequences of an arbitration" upon which he so vigorously insisted.

VI.

We have carefully considered the remaining allegations of error. We hold that they are, individually and collectively, without merit.

WE AFFIRM.

Seymour, Circuit Judge, concurs in the result.

APPENDIX B

NOVEMBER TERM — February 23, 1982

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

ORMSBEE DEVELOPMENT COMPANY, a Wyoming corporation, Plaintiff,	)	
v.	)	
CORRINE GRACE and MICHAEL P. GRACE, Defendants-Cross-Defendants, Appellants,	)	Nos. 80-1750, 80-1803, 81-1161
v.	)	
SANTA FE PACIFIC RAILROAD, Defendant-Cross-Claimant-Appellee.	)	

This matter comes on for consideration of appellant's, Michael P. Grace, petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS

By Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON D.C. 20543

May 25, 1982

Albert J. Beveridge, III, Esq.
Beveridge and Diamond
1333 New Hampshire Avenue, NW
Washington, DC 20036

Re: Michael P. Grace v. Ormsbee
Development Company and
Santa Fe Pacific Railroad
A-1015

Dear Mr. Beveridge:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice White who, on May 25, 1982, signed an order extending your time to and including June 23, 1982.

A copy of the Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By
Katherine Downs
Assistant Clerk

rwk
encl.
cc (letter only): counsel of record
Howard K. Phillips, Esq.,
Clerk, US Court of Appeals
for the Tenth Circuit (Your No.
80-1750, 80-1803, 81-1161)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed May 15, 1980]

ORMSBEE DEVELOPMENT COMPANY, et al.,

Plaintiffs,

vs.

CIV NO. 76-326-HB
77-148
77-149
77-150

MICHAEL P. GRACE and CORINNE GRACE, GRACE NUCLEAR, et al.,

Defendants.

MEMORANDUM OPINION

This matter comes on for consideration upon the Motion of Corinne Grace, adopted and joined in by Michael Grace, for reconsideration of the Court's decision announced in its Memorandum Opinion filed in this cause on April 1, 1980. The Court has considered the memorandum filed, together with the affidavits and the entire file in this cause, and concludes that the Motion of both Corinne and Michael Grace for reconsideration is not well taken and should be denied, and further that the Court's findings and conclusions in its Opinion of April 1, 1980 are correct and will not be altered or amended except as supplemented herein.

The Court's Opinion of April 1, 1980 found that the arbitration award made in June 1979 in favor of the Santa Fe Pacific in a dispute between it and the Graces over the expiration of certain mineral leases should be confirmed and judgment entered for the Santa Fe Pacific. As one ground for vacating the award, it had been argued that there was evident partiality on the part of Dr. Mommsen, the neutral arbitrator, in violation of both the New Mexico and federal arbitration statutes. It was argued that Dr.

Mommsen had done consulting work for General Atomic Company which is represented by the Modrall firm, and that the attorneys for Santa Fe Pacific, also from the Modrall firm, had not disclosed this relationship to opposing counsel. In denying the Motion to vacate on these grounds, the Court stated:

> . . . there is nothing in the record to indicate that this resumé [of Dr. Mommsen's which disclosed his consulting work for General Atomic] was forwarded to the Modrall firm or that they otherwise had access to this information.

Memorandum Opinion, p. 8. Subsequent to the filing of this Opinion, an affidavit was filed by a member of the Modrall firm stating that in connection with his representation of General Atomic Company in litigation totally unrelated to that involving the Santa Fe Pacific and the Graces,

> . . . I attended a lecture on the nuclear fuel industry given by Dr. J. T. Mommsen on behalf of General Atomic Company. It was my understanding that Dr. Mommsen consulted with General Atomic Company on the market for the sale of U_3O_8 to utility companies using nuclear steam supply systems for the generation of electric power. To my knowledge, Dr. Mommsen has had no contact with the Modrall firm concerning the General Atomic litigation or the nuclear industry in general.
>
> 4. Through a conversation with Ruth M. Schifani, an associate of this firm working on this matter, I became aware of the fact that Dr. Mommsen was the neutral arbitrator in this matter at some time after his appointment. I may have casually informed Mrs. Schifani that I knew of Dr. Mommsen because of my work on the General Atomic litigation. At no time prior to the Memorandum Opinion of this Court issued on April 1, 1980, did I ever discuss in detail my

awareness of Dr. Mommsen's relationship with General Atomic with any members of the firm working on this matter.

Affidavit of Mark B. Thompson III, filed April 7, 1980. The Motion for reconsideration filed by the Graces relies in part on this affidavit, but also raises several other claims, all of which were before the Court at the time of its ruling on April 1, 1980. The Santa Fe Pacific has responded to the reconsideration request by claiming that the disclosures in the affidavit should not change the Court's resolution of the evident partiality question and that the Court's prior rulings on the other issues are correct.

There is no need to restate the basis for the Court's findings on those issues unrelated to the evident partiality question. The Court continues to conclude that what was at issue in the arbitration was a community real property management question, that joinder of both spouses is not required for such under the New Mexico community property law, and that Corinne Grace is bound by the arbitration award. To the extent that the above conclusions rely in any way on statements made by Mr. Dinsmore Adams, the Court finds absolutely no merit in the claim that he did not represent Corinne Grace. The affidavit of Elvin Kantor, who was local counsel for Mr. Adams, does not change the situation. The file is replete with claims and representations by Mr. Kantor and Mr. Adams that they were appearing for both Michael and Corinne Grace. Through his affidavit Mr. Kantor has put himself in the unfortunate position of either having misrepresented to the Court who his clients were for some 24 months or having filed a misleading affidavit. Neither position comports with the Code of Professional Responsibility. The Court is completely satisfied that the statements attributed to Mr. Dinsmore Adams, to the extent they are at all relevant, were made at the time that he represented Corinne Grace, and that the actions of Elvin Kantor, to the extent also that they

are at all relevant, were taken on behalf of both Michael and Corinne Grace.

The Court is equally persuaded that the disclosures in the affidavit of Mark Thompson as to his knowledge of Dr. Mommsen's activities for General Atomic do not mandate a reversal of the Court's prior ruling on the evident partiality question, or even an evidentiary hearing. It is important to note exactly what relationship was known to the affiant and is at issue here. Dr. Mommsen, who is in the business of consulting for the uranium industry, conducted a seminar on behalf of General Atomic on a topic completely unrelated to this case. General Atomic is represented in litigation, again completely unrelated to this case, by the Modrall firm. The Modrall firm represented the Santa Fe Pacific in the arbitration in this case where Dr. Mommsen was the neutral arbitrator. At the time of the Court's Opinion confirming the arbitration award there was no evidence in the record that the Modrall firm had had any knowledge of the connection between Mommsen and General Atomic prior to their receipt of the Motion of the Graces to vacate the arbitration award. It now appears from the affidavit of one member of the firm that he knew the nature of Mommsen's work for General Atomic but was not involved in the Santa Fe Pacific - Grace arbitration and that one attorney in the firm who was involved in the latter knew that the other member of the firm had encountered Dr. Mommsen in some unrelated work for General Atomic. It also appears that Dr. Mommsen may have some continuing contact with General Atomic as a consultant.

The attorneys for the Graces argue that this case is controlled by *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). While this is clearly the leading Supreme Court case on the question, it is not all encompassing and did not present to the Court the situation in the Grace arbitration. In *Commonwealth Coatings*, *supra*, the neutral arbitrator had been a consulting engi-

neer for the prime contractor who was a party to the arbitration, and had done work for the prime contractor on the very project out of which the arbitration arose. Clearly the relationship there should have been disclosed as it involved a direct link between the arbitrator and one of the parties and the project in dispute. Such is not the situation in this case.

Nor is this case similar to the situation in *Sanko S.S. Co., Ltd.* v. *Cook Industries, Inc.*, 495 F.2d 1260 (2nd Cir. 1973), where the neutral arbitrator was president of a company which not only had been represented in an unrelated matter by the same attorneys who were representing one of the parties in the arbitration but additionally had dealings through his parent corporation with one of the parties. The contact in the present case is in no way comparable to *Sanko*.

The present case involves consulting work for another client of the law firm representing the Santa Fe Pacific. There is nothing to indicate that Dr. Mommsen had any direct dealings with the attorneys or that he had any reason to not be completely fair and honest in his deliberations due to his consulting work on an unrelated topic for General Atomic, which consulting work he had revealed to the Graces. The casual contact between the Modrall firm and Dr. Mommsen seems to be a classic case of what Justice White referred to in his concurring opinion in *Commonwealth Coatings, supra*, as a "trivial" relationship that need not be disclosed. Though the willingness of the Modrall firm to proceed with great caution in this matter is admirable, this is not a kind of relationship the firm was required to disclose, and which would be grounds for setting aside the arbitration award.

Accordingly, the Opinion of the Court entered on April 1, 1980 will not be amended, except as supplemented herein, nor will there be any further proceedings in this matter. Counsel for the Santa Fe Pacific may prepare the judgment

and forward it to opposing counsel and the Court for signatures, within seven (7) days of this date.

(s) *Howard Bratton*
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed April 1, 1980]

ORMSBEE DEVELOPMENT COMPANY, et al.,

Plaintiffs,

vs.

CIV NO. 76-326-HB
77-148
77-149
77-150

MICHAEL P. GRACE and CORINNE GRACE, GRACE NUCLEAR, et al.,

Defendants.

MEMORANDUM OPINION

This matter comes on for consideration upon the Motion of the Santa Fe Pacific Railroad Company (hereinafter Santa Fe Pacific) to confirm an arbitration award and the separate Motions of Michael and Corinne Grace to vacate, modify or set aside the same arbitration award. The Court has considered the numerous briefs filed by all sides, together with the record of the arbitration proceeding, the oral arguments of counsel and the entire file in this cause, and concludes that the Motion of the Santa Fe Pacific to confirm the arbitration award should be granted and all other Motions denied.

The history of this case is one of the more tedious stories this Court has heard, though such is not to say that the issues being litigated are not important to all parties. The story can be said to have begun in 1971 when Michael Grace entered into several mineral leases with the Santa Fe Pacific. In carrying out his obligations under the leases, Grace employed various subcontractors. The subcontractors filed suit in 1976 against Michael and Corinne Grace, as lessees and the Santa Fe Pacific as owner of the properties, seeking to foreclose on mechanics' liens which they had filed after Grace had allegedly failed to pay them for their drilling and exploration work. This dispute was ultimately settled and the complaint dismissed.

However, the Santa Fe Pacific had cross-claimed against the Graces seeking a declaration that these same mineral leases had expired in 1975 because there had been no production of uranium-bearing ore in commercial quantities, as required by their terms. To resolve this dispute, the Graces, both Michael and Corinne, requested a stay of these court proceedings pending submission of the dispute which was the subject of the cross-claim to arbitration. The Santa Fe Pacific objected strenuously, but the Court found that the parties had indeed agreed to arbitrate their disputes under the leases, including those raised in the cross-claim, and thus ordered that these proceedings be stayed pending the arbitration. This was in June 1977.

The arbitration finally took place between April 17 and May 1, 1979 in Albuquerque, New Mexico. The delay of almost two years was occasioned in large part by the slowness in choosing a neutral arbitrator due to objections by the Graces, problems during discovery in deposing certain people because of objections by the Graces and the firing of the Grace attorneys only a month before the scheduled arbitration itself. The final award of the arbitrators was made on June 27, 1979 and held in favor of the Santa Fe Pacific finding that the subject leases expired in 1975 and ordering Grace to perform any outstanding obligations un-

der them. The Santa Fe Pacific filed a Motion to confirm the arbitration award on July 6, 1979 pursuant to § 44-7-11, *N. M. Stat. Ann.* (1978).

Within the 90 days allowed by the statute, both Michael and Corinne Grace objected to the confirmation by filing Motions to vacate or set aside or modify the award, though each did so separately and for distinct reasons. The Court will consider each objection individually below, but would note that Corinne Grace objects to the award on the grounds that the leases were community property, that she had a one half interest in them and therefore that she should have been a named party to the arbitration. Additionally, she claims that there was evident partiality on the part of the neutral arbitrator, Dr. Mommsen, and that the attorney for her husband, Mr. William Condren, had a conflict of interest which should have prohibited him from acting as counsel in the arbitration proceeding. Michael Grace joins in the first two grounds for vacation urged by Corinne Grace and further asserts that a substantial amount of relevant evidence was improperly excluded by the arbitrators, that the decision making process of the arbitrators was not proper, and that a continuance on the hearing should have been granted due to his health.

Corinne Grace's Motion

The first claim made by Corinne Grace is that the leases were community real property, that she had a one half interest in them and that therefore she was a necessary party to the arbitration. She claims that her absence from the proceeding requires either vacating the award entirely or modifying it so that it does not affect her community property interest in the leases. It is undisputed that Corinne was not a named party to the arbitration and that she was not present at the arbitration proceeding. However the Santa Fe Pacific claims that she is nonetheless bound by the award by virtue of her husband's actions.

Two facts should be noted here. The first is that the Santa Fe Pacific claims the leases are not community property, despite the fact that both Michael and Corinne Grace have filed affidavits claiming they are community property. For the purposes of resolving this Motion, the Court is assuming that the leases are community real property, though it does not make that finding. Second, it should be pointed out that the Santa Fe Pacific knew Corinne Grace was not a named party to the arbitration and attempted to join her prior to the arbitration. At the meeting where the issue was raised, it was Corinne's attorney, Mr. Dinsmore Adams, who objected to her being made a formal party because, *inter alia*, she had not signed an arbitration agreement. The arbitrators then ruled that she would not be joined as a party.

The Community Property Act of 1973, Laws 1973, Chap. 320 was passed in order to bring New Mexico property laws into conformity with the then newly passed state Equal Rights Amendment. As originally passed, the Act provided, as regards community real property, as follows:

> Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses *must join in all transfers, conveyances, or mortgages or contracts to transfer, convey or mortgage* any interest in community real property . . . The spouses *must join in all leases and in the management of community real property.*

(emphasis added). Laws 1973, Chap. 320, § 8. In 1975 the Legislature amended the above section, deleting that portion of the statute requiring joinder of spouses in the management of community real property. § 40-3-13, *N. M. Stat. Ann.* (1978). Thus the current statute requires joinder as stated above, but is completely silent on the question of management.

Corinne Grace claims that the arbitration involved a "transfer," "conveyance" or "lease" of community real prop-

erty, and that joinder was required under the statute. The Santa Fe Pacific on the other hand claims that the arbitration was a "management" action, and that in the absence of any specific statutory provision, either spouse has the power to manage community real property. The Court concludes that what is at issue here is the power to manage community real property. The question is not whether Michael Grace could transfer or convey the real property to anyone in the arbitration proceeding, for if any such transfer or conveyance resulted, it was automatic and pursuant to the terms of the original lease. What is at issue is whether a single spouse can participate in a proceeding affecting community real property, employ counsel and direct the litigation without the joinder of the other spouse. That is the question in this case and it is a management question.

Given this, the Court concludes that under New Mexico law both spouses have equal rights in the property giving either spouse the right to manage and deal with the community real property, except in those instances where the statute requires joinder. This is the only possible conclusion that can be drawn from the amendment of the 1973 statute, the passage of the Equal Rights Amendment, and the abolition of sole control in the husband. The parties argue as to the significance of the case of *Cooper* v. *Texas Gulf Industries*, 513 S.W.2d 200 (Tex. 1974) which held that litigation involving one spouse was not binding on the other spouse in a subsequent action and that the doctrine of virtual representation had been abolished. The Court finds that case inapposite in that its holding was entirely controlled by the Texas family code which defined the subject property as "joint management property," 513 S.W.2d at 202. The reliance by the New Mexico Court of Appeals on the *Cooper* case, *supra*, in *Amador* v. *Lara*, 603 P.2d 310 (N.M. 1979) has no effect on the present question as the latter involved community personal property and management of such property is explicitly governed by statute.

See § 40-3-14, *N. M. Stat. Ann.* (1978). The other case strenuously argued by both counsel, *Mundy & Mundy, Inc.* v. *Adams*, 602 P.2d 1021 (N.M. 1979), holds that settlement and compromise of a claim by one spouse will bar relitigation of the underlying issue in a subsequent suit by the other spouse, and that the non-party spouse will be bound by the actions in the first suit. It is not clear that this case involving adverse possession is particularly relevant in light of the current New Mexico community property statute, but nothing in it dictates against the Court's conclusion that Corinne Grace is bound by the management actions of Michael Grace.

The Court having found that Corinne is bound by the arbitration award, the next question is whether the award should be set aside pursuant to § 44-7-12a(2), *N. M. Stat. Ann.* (1978), on the grounds of evident partiality on the part of the neutral arbitrator as urged by both Corinne and Michael Grace. It was Corinne Grace who raised this issue initially and briefed it, leading to its discussion at this point; but it was Michael Grace who pursued the question at the oral arguments in this case. As outlined in Corinne Grace's briefs and as originally presented to the Court the argument was that Dr. Mommsen, the neutral arbitrator, had done consulting work for several firms whose parent or affiliated companies were allegedly represented by the law firm of Modrall, Sperling, Roehl, Harris and Sisk, which is the firm that represented Santa Fe Pacific in these arbitration proceedings. Corinne Grace originally argued that Dr. Mommsen should have disclosed these connections and that his failure to do so was grounds for vacating the arbitration award. At the hearing, Michael Grace, in adopting this argument, shifted his position and argued that it was the Modrall firm's failure to disclose these connections with Dr. Mommsen that was fatal to the arbitration award.

The undisputed facts appear to indicate that the actual appointment of arbitrators for this case began in July 1977.

[APPENDIX]

The American Arbitration Association (AAA) requested that each party nominate an arbitrator. This was apparently accomplished by the end of October 1977, at which time the AAA sent the parties a list of persons from which to select a neutral arbitrator. In January 1978 the attorney for the Graces, Mr. Dinsmore Adams, rejected all names on the list and requested a new panel. Shortly thereafter the AAA called all the parties and suggested that they consider Dr. Jack Mommsen as a possible neutral, informing them of Dr. Mommsen's professional background. A month later the Santa Fe Pacific accepted him. Near the end of February the AAA informed the parties that unless they objected to Dr. Mommsen by March 3, 1978 he would be appointed and any objections waived. On March 2, 1978 Mr. Adams contacted the AAA and requested additional time to consider the matter and was granted such. It appears that during this time Mr. Adams contacted Dr. Mommsen directly and inquired into his background. Finally, it appears that by March 22, 1978 the parties had agreed to Dr. Mommsen as an arbitrator.

The claim of evident partiality arises from the alleged connections between Dr. Mommsen and the Modrall law firm, including the fact that Dr. Mommsen had done consulting work in the past and had as an active client at the time of his selection the General Atomic Company, which is a partnership between Gulf Oil and Scallop Nuclear, and that the Modrall firm represents Gulf Oil. Further it is claimed that Dr. Mommsen did work for Texas Eastern Nuclear, a subsidiary of Texas Eastern Company and that the Modrall firm represents Transwestern Pipeline Company, another subsidiary of Texas Eastern Company. Finally it is claimed that there was evident partiality in that Dr. Mommsen was being considered as an arbitrator in a case involving Homestake Mining Company, which company is represented by the Modrall firm.

It is undisputed that Dr. Mommsen sent Mr. Adams a copy of his resumé, which states all of the above con-

nections with General Atomic Company, Texas Eastern Nuclear and Homestake Mining Company. It is also true that it does not mention Gulf Oil or the Modrall firm at any point. However, there is nothing in the record to indicate that this resumé was forwarded to the Modrall firm or that they otherwise had access to this information.

The United States Supreme Court has stated that the arbitration process is subject to the "simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 149 (1968). This has been found to be a per se rule in that failure to disclose non-trivial relationships with parties will be grounds for vacating an arbitration award regardless of any actual bias, prejudice, unfairness or lack of the same in the hearing. In this case it is perfectly clear that Dr. Mommsen fully complied with his obligation under *Commonwealth Coatings, supra*, and all rules of the AAA. While this same obligation would apply to counsel in the arbitration proceedings, there is absolutely no evidence that the Modrall firm was ever made aware of the relationships at issue, and thus the occasion for its disclosure never arose. For this reason the Court finds no basis in fact for setting aside the arbitration award on the grounds of evident partiality.

The final argument raised by Corinne Grace in her motion, though not pursued at oral arguments, was that the attorney who actually represented Michael Grace in the arbitration proceeding, Mr. William Condren, had a conflict of interest in the proceeding in that he is a "dealer of U. S. railroad companies' securities including Santa Fe Industries" and that he is "very close to Gulf Oil Company" through his business dealings and that he "does business with Santa Fe Pacific Railroad Co." These claims are presented in an affidavit from Corinne Grace and allegedly based on "information [I received] which was confirmed by a reputable lawyer in New York City."

The Court assumes that this argument has been abandoned as it was not presented in any manner at the oral arguments. However, even if counsel intended to pursue it and even if the alleged conflict were found to exist, the Court finds that it is not grounds for vacating the arbitration award. The statute governing vacation of an arbitration award provides for such in several enumerated situations, none of which include the above claim. *See* § 44-7-12A, *N. M. Stat. Ann.* (1978). Consistent with this, the Court finds that if any conflict existed, the remedy for Corinne Grace would lie in a direct action against the attorney.

Accordingly, the Court finds that none of the grounds alleged by Corinne Grace for vacation of the arbitration award are well taken, and thus denies her motion.

Michael Grace's Motion

Michael Grace has filed a separate Motion to vacate the arbitration award against him. The Motion first claims that the arbitrators refused to hear "significant amounts" of evidence offered by him concerning the leasing policies of the Santa Fe Pacific. He claims the proffered evidence was relevant particularly on the question of interpretation of the terms of the leases he held.

Specifically, the leases in question provided for automatic renewal upon application by the lessee to the Santa Fe Pacific within thirty days prior to the lease's expiration, provided that the lease was producing "uranium-bearing ore in commercial quantities." When Grace applied for renewal, his application was denied. At the arbitration he attempted to introduce any number of other leases held by the Santa Fe Pacific in the same geographic area as his to show that he was treated differently from all other leaseholders in terms of how the Santa Fe Pacific interpreted the term "commercial quantities." The arbitrators ruled that they would consider any evidence of other leases

if Michael Grace could show that the leases were automatic renewal situations, as opposed to instances where the parties renegotiated the terms of the lease or entered into entirely new contracts.

The Court has reviewed the transcript of the arbitration proceeding filed by the parties and it reveals that the arbitrators were shown and did consider all the leases that Michael Grace and Mr. Condren wanted to tender, and that they ruled on each lease's admissibility in accordance with the initial relevancy determination outlined above. The only lease that Michael Grace has tendered to the Court for consideration is what is known as the KSN lease, which was discussed at length by the arbitrators and reviewed by them during the hearing. There is nothing else specifically tendered as having been improperly excluded so the Court is unable to evaluate whether other items might have been relevant.

The scope of review of a district court upon a Motion to confirm or vacate an arbitration award is extremely limited, *Campo Machining Co.* v. *Local Lodge No. 1926*, 536 F.2d 330 (10th Cir. 1976); *Office of Supply, Government of the Republic of Korea* v. *New York Navigation Company, Inc.*, 469 F.2d 377 (2nd Cir. 1972), and the Court will not lightly set aside an arbitration award. There is nothing in the record to indicate that the distinction between renewal and renegotiation was clearly erroneous or an abuse of discretion. Nor can the Court say that the exclusion of the KSN lease, which it has reviewed, was improper. Given that Michael Grace has cited nothing else in the record, the Court concludes that the rulings of the arbitrators were proper and that the Motion to vacate the award on these grounds is not well taken.

The second ground for vacating the arbitration award urged by Michael Grace is his contention that the arbitrator chosen by him, Mr. George Cutler, was denied an opportunity to fully participate in the decision making

process. In support of this claim, Michael Grace has submitted the affidavit of Mr. Cutler which states that he was

> affectively denied a right to expect that all arbitrators would participate in the determination of the award as the arbitrator selected by the claimant was not given a sufficient opportunity to express his views, argument and reasoning behind his opinion and beliefs with respect to the merits of the claimant's position.

He claims that when he arrived at the final meeting of the arbitrators in San Francisco, Dr. Mommsen immediately stated his decision, which was favorable to the Santa Fe Pacific, and that this was then immediately concurred in by Mr. Jennings, the arbitrator chosen by the railroad. At this point, Cutler states that he felt "the decision-making process was, for all intents and purposes, concluded" and that he did not have a chance to express his views. Though the Santa Fe Pacific has filed an affidavit from Mr. Jennings controverting these allegations, the Court will assume, for the purposes of resolving this issue, that Mr. Cutler's affidavit is true. Even in this situation the Court concludes however that there was no misconduct warranting vacation of the arbitration award.

In the case of *Artie Shaw Presents, Inc.* v. *Snyder*, 362 N.Y.S.2d 158 (1974), a strikingly similar claim was made by the arbitrator chosen by the losing party. There it was alleged in a conclusory affidavit from the disgruntled arbitrator that he was "deprived of any meaningful opportunity to deliberate upon the issues with [his] co-arbitrators." 362 N.Y.S.2d at 159. There was no evidence in that case, as there is none in this case, that any arbitrator was excluded from any procedings by the others or that all were not present for the taking of the evidence. The only exclusion of the complaining arbitrator in *Artie Shaw, supra*, was due to his own refusal to discuss the case with the other two arbitrators on the telephone. The New York Court concluded that

> . . . although it is desirable to have all of the arbitrators meet, following final submission of the controversy and participate in the deliberations so that the parties to the dispute may have the benefit of the effect the views and arguments of each arbitrator might have upon the others, the presence of all is not required.

362 N.Y.S.2d at 159.

There is no evidence in this case that any meetings or consultation were had in secret, intentionally excluding Mr. Cutler, as was the situation in *Jones* v. *Bishop*, 218 Ill. App. 318 (1920), relied upon by Michael Grace. Nor is there any misconduct such as in *Blin* v. *Hay*, 2 Tyler [Vt.] 304 (1802), where two of the arbitrators were not notified of the meeting, let alone present. The Court can find no grounds for setting aside the arbitration award on this issue.

The final argument against the arbitration award was made by counsel for Michael Grace for the first time at the oral arguments in this case. Michael Grace is now claiming that the arbitration award should be set aside on the grounds that he was forced to go to arbitration at a time when he was recovering from surgery and could not be present for the entire proceeding. The background to this claim is that when Michael Grace changed attorneys just prior to the arbitration, a continuance was granted in order for the new attorney to prepare the case, but only upon the promise of counsel for Michael Grace that no more continuances would be sought. The Court finds that demand by the arbitrators completely reasonable for there had been nearly a two year lapse since this Court had stayed proceedings pending arbitration and nearly three years since the first arbitration demand had been made. Subsequently, Michael Grace learned that he needed surgery. No demand for relief from his prior promise or for a continuance was made by counsel. The arbitration began as scheduled and though Michael Grace was not there for the

first five days of the hearing, which essentially amounted to the presentation of his own case, he did appear to testify on his own behalf and was present throughout the presentation of evidence by the Santa Fe Pacific. Michael Grace now claims however, that the arbitration should not have proceeded and that the arbitrators should have rescheduled the hearing at a time when he could assist his attorney more fully.

The Court finds this argument to be completely without merit. The Court deals with scheduling problems on its own docket every day and can fully appreciate the need to hold dilatory counsel and parties to their agreements and to the calendars. This is particularly true where no demand for relief was ever presented to the arbitration panel. Despite the fact that it was the Graces, and not the Santa Fe Pacific, who wanted to go to arbitration, the Graces have fought any forward movement in this matter at all stages. It is understandable that the arbitrators would eventually tire of this, and demand that they proceed. In light of this, and the fact that there is nothing in the record that would indicate that Michael Grace was prejudiced in any way as a result of his absence for a few days from the hearing, the Court will deny the Motion to vacate on these grounds.

In conclusion the Court finds that none of the arguments made by either Corinne or Michael Grace are well taken. They appear to be yet one more attempt to avoid the consequences of an arbitration upon which they insisted. Perhaps arbitration seems less attractive now, but that does not entitle them to a second chance. The record discloses no grounds for vacating the award, and accordingly the Court will grant the Motion of the Santa Fe Pacific to confirm the arbitration award. A separate Order will be entered in accordance herewith.

(s) *Howard Bratton*
UNITED STATES DISTRICT JUDGE

81-2353

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL P. GRACE,
Petitioner,

v.

SANTA FE PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENT SANTA FE PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted and applied to the facts of this case this Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968), that arbitrators are required to disclose past business relationships with parties to an arbitration.

2. Whether the decision of the Court of Appeals was in accord with interpretations and applications of the *Commonwealth Coatings*, *supra*, ruling by other courts of appeals.

3. Whether Petitioner had a constitutional due process right to an evidentiary hearing on a claim of evident partiality of an arbitrator based upon a contention that the arbitrator possibly had a tenuous, trivial, indirect and insubstantial relationship with the attorneys for one of the parties to the arbitration.

4. Whether Petitioner may question for the first time in his Petition the correctness of District Court rulings pertaining to (a) stay of litigation pending arbitration; (b) permitting discovery in aid of arbitration; (c) requiring the matter to proceed to arbitration after nearly two years of delay by Petitioner; and, (d) ordering dismissal of a second arbitration demand by Petitioner in California on the ground of *res judicata*.

5. Whether the decision of the arbitration panel, confirmed by the District Court and the Court of Appeals, holding that Petitioner had failed to achieve production of uranium in commercial quantities constituted a condemnation of solution mining.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

MICHAEL P. GRACE,

Petitioner,

v.

SANTA FE PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF RESPONDENT SANTA FE PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Santa Fe Pacific Railroad, respectfully prays that the Court deny Petitioner's request that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 4, 1982, and the Order denying Petitioner's Motion for Rehearing entered on February 23, 1982.

OPINIONS BELOW

See Petition for Writ of Certiorari.

JURISDICTION OF THIS COURT

See Petition for Writ of Certiorari.

STATUTES INVOLVED

A. Federal Arbitration Act, 9 U.S.C. §§ 3, 9 (*see* Appendix for text).

B. New Mexico Arbitration Act §§ 44-7-2(B), 7, 12 (A)(2), 16 N.M.S.A. (1978 Comp.) (*see* Appendix for text).

STATEMENT OF THE CASE

In order to correct inaccuracies and ommissions contained in Petitioner's Statement of the Case, Respondent is hereby submitting its own Statement of the Case with appropriate references to the record, as follows:

In 1968, Respondent determined to offer for lease at auction certain mineral properties owned by it. (R. XI, 1140-46). Petitioner, who had a number of years experience in mineral exploration, was the successful bidder on options covering several of these properties. (R. X, 925-26). The options permitted Petitioner to explore the optioned property for uranium and, thereafter, to enter into uranium mining leases. (R. XI, 1144, 1155, 1158). Petitioner ultimately elected to lease several parcels from Respondent under five separate uranium leases. The leases allowed the Petitioner one year for exploration activities and an additional three years to conduct mining operations. He was required to furnish periodic reports of activities to Respondent. The leases prohibited Petitioner from subjecting the properties to any liabilities or liens. If, at the expiration of a lease, Petitioner was producing uranium-bearing ore in commercial quantities from the leased premises, the Respondent was obligated to renew the lease for an additional three years. (R. I, 131).

During the lease terms, Petitioner failed to furnish the required geologic and exploration reports to Respondent, and allowed the accumulation and filing of liens against the properties totalling $404,533.93. (R. I, 3, 78; II, 280, 312, 341). Despite his failure to furnish required reports, Petitioner did perform exploration work on the

leased premises on an intermittent basis. (R. XIV, 1880-81, 1915). While this exploration revealed the presence of uranium mineralization on some of the leased properties, no "ore body", as that term is defined in the industry, was ever discovered on any of the properties.[1] (R. XIII, 1685-86; XIV, 866-67, 1898; XV, 1929). Therefore, contrary to the assertion in the Petition (p. 3), Petitioner did not discover any "substantial uranium reserves" on the leased properties.

As the expiration dates of the leases approached, Petitioner began desperate attempts at "mining operations" to convince the Respondent that he had achieved commercial production. These attempts included some pit mining on one property and "in situ" or "solution mining" projects on two other parcels. (R. XIV, 1933-34, 2083-84; IX, 735-36; XV, 2038-40; VII, 318; XIII, 1675-78; XIV, 1862, 1867). Solution mining is a process whereby chemicals are injected into the mineral-bearing strata, allowed to remain there for a time and then pumped to the surface, with the objective being to recover U_3O_8 (yellowcake) from processing uranium suspended in solution.[2] (*Ibid*). This process was not permitted by Respondent and was considered to be an inappropriate method of mining that was possibly injurious to the property. (R. IX, 735-36; XV, 2038-40). These solution mining projects were considered by the Petitioner himself as being "pilot" or "experimental". (R. X, 982). They had an "air of improvisation and haphazardness." (R. XIII, 1668-69). The operations produced a total of 178 pounds of uranium having a market value of less

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[1] "Ore" is defined in the industry as mineral of sufficient quantity and grade to permit mining at a profit—producing at least enough income to cover expenses of operation. (R. VI, 164; VIII, 551; XIII, 1681). Thus, the existence of uranium mineralization does not necessarily indicate "ore" or an "ore body."

[2] "Yellowcake" is not produced directly by "in situ" mining operations as claimed at p. 3 of the Petition.

than $5,000 as against operating costs in excess of $70,000. (R. XIII, 1675-78; XIV, 1862, 1867). Expert testimony established that this did not qualify as commercial production and would never have resulted in such production. (R. XIII, 1678; XIV, 1867). Petitioner's operation was so slipshod that he even failed to obtain the requisite New Mexico license to conduct mining operations although his consultants had advised him to do so. (R. VI, 120-25; R. XV, 2084).

Nevertheless, prior to the expiration dates of the leases, Petitioner attempted to renew them, contending that he had achieved production of uranium-bearing ore in commercial quantities. (R. XI, 1211-13). Respondent thereupon hired an independent mining consultant to review Petitioner's activities, study the properties and render a report on whether production in commercial quantities had been achieved on any of them. (R. XI, 1214). The consultant's report was that such production had not been achieved and Petitioner was notified that the leases had expired.

Shortly thereafter, in 1976, five exploration companies filed suit in the United States District Court for the District of New Mexico to foreclose mechanics' liens on properties leased by the Petitioner from Respondent and on which the Petitioner had ordered mineral exploration. (R. I, No. 1). The suits named the Respondent as a defendant and sought to foreclose the interests of both Petitioner and Respondent. Respondent filed an original and, later, an amended crossclaim against Petitioner seeking a determination that all rights of Petitioner in the leased properties had terminated by reason of failure to achieve production in commercial quantities and various breaches of the lease terms. Petitioner thereupon filed a demand for arbitration with the American Arbitration Association, seeking to have the leases declared valid and in full effect. (R. I, 184). On motion of the Petitioner, the District Court stayed proceedings on the crossclaim pending arbitration. (R. II, 276).

Pursuant to the rules of the American Arbitration Association, Petitioner and Respondent each nominated an arbitrator and the Association proposed a neutral arbitrator, Dr. Jack T. Mommsen ("Mommsen"), after numerous delays occasioned by Petitioner and his counsel. (R. III, 717). Respondent accepted the proposed arbitrator but Petitioner requested additional time for consideration and contacted Mommsen directly to inquire into his background. (R. III, 724). Mommsen sent a letter to Petitioner's attorney setting forth his educational and work background. (R. III, 610-14). The letter was never sent to Respondent or its counsel, the Modrall law firm. (R. III, 725). The resume showed Mommsen to be a chemist, mechanical engineer and economist by education, a consultant in the field of nuclear energy since 1960 and employed by some 25 public and private entities. Among his clients were General Atomic Company ("General Atomic") and Texas Eastern Nuclear. General Atomic is a partnership of Gulf Oil Corporation ("Gulf") and Scallop Nuclear Corporation. Texas Eastern Nuclear is a subsidiary of Texas Eastern Corporation. (R. II, 724). Texas Eastern Corporation also has another subsidiary by the name of Transwestern Pipeline Company. At the time the resume was transmitted to Petitioner's counsel, it was a matter of common knowledge that Gulf was planning on mining uranium ore on a property adjacent to one of the properties leased by Petitioner from Respondent.

The property which Petitioner had adjacent to the Gulf property was referred to as the "Section 25" property. As a matter of fact, Gulf had approached Petitioner prior to expiration of his lease to discuss a mining arrangement on the Section 25 property, which proposal Petitioner rejected. (R. X, 943; XI, 1161-62). Following expiration of the Petitioner's lease on the Section 25 property, Petitioner entered into an arrangement with a third party, Richard Bokum, whereby, if Petitioner was able to secure an arbitration award reinstating the Sec-

tion 25 lease, it would be assigned to Bokum who, in turn, was committed by contract to offer it to Gulf. (R. IX, 667-70, 715; XI, 1252-53).

After contacting Mommsen directly, and receiving his resume, Petitioner accepted Mommsen as the neutral arbitrator. There were then further delays occasioned by Petitioner's reluctance to move forward with the arbitration. However, the matter finally culminated in a two and one-half week evidentiary hearing. (R. III, 717). The decision of the arbitration panel, with the Petitioner's nominee dissenting, was adverse to Petitioner. (R. III, 516-20). On July 3, 1979, Respondent moved to confirm the arbitration award. (R. II, 516). Petitioner moved to vacate the award pursuant to § 44-7-12(A)(2) N.M.S.A. (1978 Comp.), on the ground of evident partiality of the neutral arbitrator. (R. III, 549). Among the facts alleged were that:

(1) Mommsen had consulted for General Atomic and General Atomic was represented by Respondent's attorneys, the Modrall law firm, albeit on unrelated matters;

(2) Mommsen had consulted for Texas Eastern Nuclear and the Modrall law firm represented a sister corporation, Transwestern Pipeline Company; and,

(3) Mommsen was being considered as an arbitrator in a matter involving Homestake Mining Company, which was a client of the Modrall law firm.

On April 1, 1980, the District Court denied the Motion to Vacate Arbitration Award and confirmed the award. Following that order, in an attempt to correct a misimpression in the mind of the District Court, the Modrall law firm filed an affidavit apprising the court that one of the attorneys who had worked for General Atomic knew of Mommsen and that Mommsen had been retained as a consultant for General Atomic, although he had never had any personal contact with Mommsen. Following the affidavit and a spate of new motions by Peti-

tioner, the District Court entered another opinion on May 15, 1980, supplementing, but not changing, the April 1st opinion. On May 23, 1980, the District Court entered a Judgment confirming the arbitration award. (R. III, 768). Petitioner then appealed to the United States Court of Appeals for the Tenth Circuit. (R. III, 786). The Court of Appeals affirmed the decision of the District Court on January 4, 1982.

ARGUMENT FOR DISALLOWANCE OF THE WRIT

Summary of Argument

A. This is a case involving an effort by Petitioner to vacate an arbitration award on the ground of evident partiality on the part of a neutral arbitrator in a commercial arbitration. The arbitrator disclosed his business and educational background to the Petitioner prior to his selection as arbitrator. The neutral arbitrator had no prior business dealings with either of the parties to the arbitration or their attorneys. The record disclosed only that, at different times, and on different matters, the neutral arbitrator had consulted for General Atomic, which was represented by Respondent's attorneys. It also disclosed that the neutral arbitrator consulted for Texas Eastern Nuclear and the Respondent's attorneys had represented a sister corporation of Texas Eastern Nuclear. Finally, the neutral arbitrator was being considered as an arbitrator on a matter involving Homestake Mining Company, also represented by Respondent's attorneys. There was no evidence that Respondent's attorneys ever had any contact with the neutral arbitrator; nor that the neutral arbitrator knew of the clients represented by Respondent's attorneys; nor that Respondent's attorneys knew, at the time of his selection, of the neutral arbitrator's clientele. Therefore, there was no prior business relationship of any kind between the neutral arbitrator and the Respondent or Respondent's attorneys. The neutral arbitrator's connection, if any, with the Respondent's attorneys was, at best, indirect, trivial and insubstantial.

As a consequence, the neutral arbitrator did not breach any duty of disclosure created by this Court in *Commonwealth Coatings Corp. v. Continental Casualty Co., supra*, and the ruling of the United States Court of Appeals upholding the arbitration award was completely in accord with that decision.

B. There is no conflict in the circuits over application of this Court's ruling in *Commonwealth Coatings Corp. v. Continental Casualty Co., supra*. It is clear under that case that an arbitrator must disclose prior business dealings with the parties to an arbitration. By interpretation, the rule has been extended to include prior business dealings with attorneys for the parties. In this case, the neutral arbitrator never had any business dealings with either party to the arbitration or their attorneys. He completely disclosed to Petitioner his educational and business background, and was accepted by Petitioner. Under the circumstances, there was no basis for vacation of the arbitration award under the *Commonwealth Coatings* decision.

C. Petitioner claims that, because the neutral arbitrator and the Respondent's law firm had one common client and other clients that had corporate ties to one another, albeit on totally unrelated matters, an evidentiary hearing might "possibly" have revealed some business connection between the arbitrator and the Respondent's law firm. The Court of Appeals correctly held that the possibility of such a tenuous and indirect relationship was not sufficient to justify an evidentiary hearing on Petitioner's motion to vacate arbitration award. Furthermore, an evidentiary hearing on a motion to vacate an arbitration award is a matter within the discretion of the trial court and not a matter of right. Therefore, Petitioner did not suffer any denial of due process.

D. Petitioner's arguments under Point III are all new issues not raised in the District Court or Court of Appeals. In them, Petitioner seeks to question the correct-

ness of District Court rulings staying litigation pending arbitration; permitting discovery in aid of arbitration; requiring the matter to proceed to arbitration after nearly two years of delay caused by Petitioner; and, ordering dismissal of a second arbitration attempt by Petitioner in California on the ground of *res judicata*. Not having raised these issues previously, Petitioner is not entitled to have them reviewed by certiorari. Furthermore, the rulings were correct. Staying the litigation pending arbitration is specifically permitted by the federal and state arbitration statutes. Discovery was permitted pursuant to a written stipulation by Petitioner. Petitioner did not object to the District Court requiring the matter to proceed to arbitration after a two year delay nor did he request a continuance. And, all of the issues which Petitioner attempted to raise in the California arbitration had already been determined in the New Mexico arbitration.

E. Petitioner claims that the District Court and the Court of Appeals condemned solution mining as a production technique. This is not correct. The arbitration panel decided that Petitioner's rights under the leases with Respondent had terminated because he had not achieved production in commercial quantities. The District Court and the Court of Appeals confirmed this decision. That action did not condemn solution mining in any manner.

I. THE COURT OF APPEALS CORRECTLY INTERPRETED AND APPLIED THIS COURT'S PREVIOUS DECISION IN COMMONWEALTH COATINGS.

Petitioner has attempted to persuade the Court that the decision of the Court of Appeals was somehow in conflict with this Court's decision in *Commonwealth Coatings, supra*. That can only be determined in the context of the claims raised by the Petitioner. As stated by the Court of Appeals, Petitioner has contended that:

(1) Mommsen consulted for General Atomic and the Modrall law firm, Respondent's attorneys, represented General Atomic;

(2) Mommsen consulted for Texas Eastern Nuclear, a subsidiary of Texas Eastern Corporation, and the Modrall law firm represented Transwestern Pipeline Company, another subsidiary of Texas Eastern Company; and,

(3) Mommsen was being considered as an arbitrator on a case involving Homestake Mining Company, another client of the Modrall law firm.

The record before the Court of Appeals established that, with regard to the one common client, General Atomic, Mommsen and the Modrall law firm represented that company on unrelated matters. Mommsen and the Modrall law firm never had any business dealings or contact with one another. At most, one member of the Modrall law firm, who did not work on this case, was aware of Mommsen's retention by General Atomic but never had any contact with him.

Petitioner now contends that Mommsen somehow violated the disclosure standard of *Commonwealth Coatings* and that the Court of Appeals somehow misinterpreted that case in reviewing the District Court's denial of the Motion to Vacate Arbitration Award. To this, the Petitioner has added a new argument, raised for the first time in this Petition for Writ of Certiorari, to the effect that Mommsen should have advised Petitioner that General Atomic was a partnership between Gulf and Scallop Nuclear, because of Gulf's interest in the Section 25 property and subsequent acquisition of that property. Neither of these assertions, however, is meritorious or justifies the granting of a Writ of Certiorari.

The Petitioner correctly analyzed the gist of the *Commonwealth Coatings* decision in stating that this Court held that an arbitrator has a duty to disclose past financial dealings with a "party" notwithstanding the ab-

sence of evidence of fraud or bias. (Petition, p. 7). To that extent, this Court may have created a "per se" rule. However, that avails the Petitioner nothing since Mommsen never had any financial dealings with either of the parties to the arbitration. He did disclose all of his other dealings in the uranium business and, therefore, there was no violation of the disclosure requirement of *Commonwealth Coatings*.

Following *Commonwealth Coatings*, in *Sanko S.S. Co. v. Cook Ind., Inc.*, 495 F.2d 1260 (2d Cir. 1973), the United States Court of Appeals for the Second Circuit extended the disclosure requirement of *Commonwealth Coatings* to include disclosure by an arbitrator of past dealings with the attorney for a party to an arbitration. Assuming that this Court would endorse the *Sanko* extension, the Court of Appeals correctly interpreted and applied both decisions to the facts of this case. Since Mommsen never had any business dealings with the Modrall law firm either, he did not violate the extended disclosure requirement.

The Petitioner seeks to impose some additional disclosure requirement on Mommsen based upon the facts that he and the Modrall law firm had one common client (General Atomic); that both did work for separate subsidiaries of the same corporate parent (Texas Eastern Corp.); and, that another client of the Modrall law firm (Homestake Mining Co.) was involved in an arbitration in which Mommsen was being "considered" as an arbitrator. The Petitioner suggests that there was something sinister about the foregoing, ignoring that tenuous connections such as these would be expected given the facts that Mommsen is an expert in the nuclear energy business and that the Modrall law firm represents companies engaged in that business. Nevertheless, assuming the existence of such "facts", there was still nothing for Mommsen to disclose either factually or legally under the *Commonwealth Coatings* decision.

Factually, Mommsen could not have disclosed the Modrall law firm's clientele since he had no way of knowing which of his clients the Modrall law firm might have represented. He had never dealt with the Modrall law firm and any knowledge on his part of common clientele would be sheer coincidence. Since he apparently had no knowledge of any of the relationships of which the Petitioner complains, there was nothing that he could have disclosed under the circumstances.

Furthermore, even if Mommsen had been aware that the Modrall law firm had a client in common with him, or the other associations asserted, such connections were so tenuous, trivial and insubstantial as to be beyond the scope of any disclosure requirement of *Commonwealth Coatings*. In *Commonwealth Coatings*, in his concurring opinion, Mr. Justice White stated:

> ". . . The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. . . . This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or *if they are unaware of the facts but the relationship is trivial*. . . .
>
> * * * *
>
> . . . [A]n arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. . . ." (Emphasis added.)

89 S.Ct. at p. 340. Following that language, in *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548 (2d

Cir. 1981), *cert. den.*, 451 U.S. 1017, (1981), the United States Court of Appeals for the Second Circuit held that a mere appearance of bias does not equate with the evident partiality necessary to vacate an arbitration award and refused to do so where the neutral arbitrator in one arbitration appeared as an expert witness in another arbitration for one of the law firms involved in the first arbitration. Similarly, in *United States Wrestling Fed. v. Wrestling Division of the AAU, Inc.*, 605 F.2d 313 (7th Cir. 1979), the United States Court of Appeals for the Seventh Circuit held that *Commonwealth Coatings* did not require an arbitrator to disclose insubstantial and trivial relationships, adopting as a "guiding principle" that:

> The interest or bias of an arbitrator must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative."

605 F.2d at p. 318. Finally, in *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196 (7th Cir. 1980), *cert. den.*, 449 U.S. 873, (1980), the Seventh Circuit again held that the *Commonwealth Coatings* decision requires an arbitrator to disclose only significant connections with a party to an arbitration, particularly where the possibility of bias is highly speculative. This Court refused to grant certiorari in the *International Produce* and *Tamari* cases. Consequently, under *Commonwealth Coatings*, as interpreted by at least two circuits, even if Mommsen had been aware of the Modrall law firm connection with a couple of his clients, he would have been under no duty to disclose that connection because of its tenuous, trivial and insubstantial nature.

Petitioner's further attempt to raise a new issue, *viz.*, Mommsen's alleged duty to disclose Gulf's partnership interest in General Atomic, is also inappropriate. Even if Petitioner is entitled to raise the issue for the first time on a Petition for Writ of Certiorari, the assertion has little merit. Given the fact that the ownership of Gen-

eral Atomic was a matter of common knowledge in the uranium industry, it is difficult to believe that Petitioner was unaware that Gulf was one of the partners in the venture. However, regardless of that, Gulf's ownership interest in General Atomic, a client of Mommsen, hardly creates even an appearance of bias in this case simply because Gulf ultimately acquired the Section 25 property after Petitioner's interest was terminated. There is nothing in the record to suggest that Mommsen ever worked for Gulf, or had any relationship with Gulf by which he would have profited from Gulf's acquisition of the Section 25 property. Furthermore, the Petitioner's implication that Mommsen favored Respondent's position in the arbitration because of some desire to assist Gulf in obtaining the Section 25 property is simply a misrepresentation of the facts. The evidence during the arbitration proceeding showed that Petitioner had made a deal with Richard Bokum, a uranium entrepreneur, whereby the Section 25 property had been assigned to him contingent upon Petitioner's succeeding in the arbitration. Bokum, in turn, had a contractual commitment to offer the Section 25 property to Gulf if he acquired it. (R. IX, 667-70, 715; XI, 1252-53). Consequently, if Petitioner's theory is that Mommsen somehow wanted to benefit Gulf, then the easiest way for him to have done so would have been to rule in Petitioner's favor. As a matter of fact, Mommsen was not interested in Respondent's plans for the leased property and thought that such plans were irrelevant to the arbitration. (R. XII, 1322).

In summary, Mommsen revealed all the information he was required to reveal under the *Commonwealth Coatings* decision and other courts of appeals cases interpreting that decision. He never had any business relationship whatsoever with either the Respondent or the Respondent's attorneys, and his connection with the Respondent's law firm was, unbeknownst to him, trivial and insubstantial. There was nothing about it which he either could, or should have revealed. The eleventh hour claim

that Mommsen had a duty to disclose that his client, General Atomic, was partially owned by Gulf, is not only too late but has no merit since the implication that Mommsen showed favoritism to Respondent in order to benefit Gulf is simply untrue under the facts of the record. The Court of Appeals did not, therefore, misinterpret the *Commonwealth Coatings* decision, nor is there any conflict in the circuits over such interpretation.

II. PETITIONER HAD NO DUE PROCESS RIGHT TO AN EVIDENTIARY HEARING AND THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner claims, in the caption of this portion of his Petition, that his right to due process of law was violated in the denial of an evidentiary hearing on the conduct of the arbitration proceeding and the adequacy of Mommsen's disclosure. (Petition, p. 10). The adequacy of disclosure was discussed under the previous point. The assertion pertaining to conduct of the arbitration proceeding relates to an affidavit by the dissenting arbitrator that he was excluded from the deliberative process. With respect to this claim, the Court of Appeals adopted the finding of the District Court. The District Court noted that the dissenting arbitrator's affidavit was disputed by a counter-affidavit but, for purposes of resolving the issue, assumed the dissenting arbitrator's assertions to be true. Nevertheless, they showed absolutely no evidence of exclusion of the arbitrator from any deliberations, nor did they evidence any misconduct. *Ormsbee Development Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982), at p. 1152. "The finality of arbitration weighs heavily in its favor and cannot be upset absent exceptional circumstances." (*Ibid.*) The Petitioner's contention failed "to establish the exceptional circumstances warranting vacation of the award upon the refusal of the district court to hold an evidentiary hearing." (*Ibid.*)

It is noteworthy that Petitioner fails to cite any authority for the proposition that there is a due process

right to an evidentiary hearing and does not even discuss the concept of a deprivation of constitutional rights. Instead, in the argument itself, he asserts that there is a conflict among the circuits on whether an evidentiary hearing is appropriate.

The absence of any argument or authority on the due process issue is understandable because it is not a constitutional question. Petitioner attempted to vacate the arbitration award by a motion filed under the New Mexico Arbitration Act. 668 F.2d at p. 1149. Under that Act, an application to a court to vacate an arbitration award is to be made and heard in the manner provided for the hearing and making of motions. § 44-7-16 NMSA (1978 Comp.). The provision is substantially the same as the comparable provision in the Federal Arbitration Act. 9 U.S.C. § 6. The burden of proof is on the party seeking to vacate the arbitration award. *Saxis S.S. Co. v. Multifacs Int. Traders, Inc.*, 375 F.2d 577 (2d Cir. 1957); *Wright Lumber Co. v. Herron*, 199 F.2d 446 (10th Cir. 1952). The question whether an evidentiary hearing is mandatory on a motion to vacate an arbitration award was decided by the Second Circuit in *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965). There, the unsuccessful party in an arbitration moved to vacate the arbitration award and claimed that the issue raised in its motion should have been determined only after a full hearing with opportunity for oral testimony and cross-examination, and not on motion papers alone. The Second Circuit rejected that argument. Since the matter raised was to be treated as a "motion" under the Federal Arbitration Act, "motions may be decided wholly on . . . papers, and usually are, rather than after oral examination and cross examination of witnesses." 342 F.2d at p. 366. It further stated that a district court, in its discretion, may order a trial-like hearing, but "under the Federal Arbitration Act it is not an abuse of discretion . . . to decline to do so." *Ibid.* See, also, *United Nuclear Corp. v. General Atomic*, 93 N.M.

105, 597 P.2d 290 (1979). The finality of arbitration weighs heavily in its favor and an award cannot be upset except under exceptional circumstances. *Fizer v. Safeway Stores, Inc.*, 586 F.2d 182 (10th Cir. 1978). Courts are justified in exercising great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy and inexpensive process of arbitration, freely chosen by the parties. *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978). Consequently, the policy favoring the finality of arbitration awards militates against making an evidentiary hearing on a motion to vacate an arbitration award a matter of due process and such is not the law.

Furthermore, the Petitioner has not demonstrated any conflict in the circuits on whether an evidentiary hearing must be granted on a claim of non-disclosure by an arbitrator under the *Commonwealth Coatings* decision. There is no such conflict. The only appellate authority relied upon by the Petitioner is *Sanko S.S. Co. v. Cook Ind., Inc., supra*, in which the Second Circuit remanded the case to the district court for an evidentiary hearing. However, even the Second Circuit does not adhere to the view that an evidentiary hearing is always required on a claim of non-disclosure by an arbitrator. As Petitioner acknowledged, in *Cook Ind., Inc. v. C. Itoh & Co.*, 449 F.2d 106 (2d Cir. 1971), *cert. den.*, 405 U.S. 921, (1972), the Second Circuit denied an evidentiary hearing on a claim that the neutral arbitrator's employer had extensive business dealings with one of the parties. It noted that the other party knew, or should have known, or should have expected, in the context of the business involved, that the neutral arbitrator or his employer would have had past business dealings with the other party to the arbitration. The Second Circuit also ruled in *Andros Compania Maritima, S.A. v. Marc Rich & Co., supra*, that it was not error for the district court to deny an evidentiary hearing on a claim that the neutral ar-

bitrator and the president of the successful party had previously served together on nineteen arbitration panels, noting that the movant did not argue that it had demonstrated that the arbitration award should be set aside but only that it was denied a chance to show why this should be done. 579 F.2d at 697. Similarly, the Second Circuit affirmed refusals, without evidentiary hearings, to vacate arbitration awards on the ground of evident partiality in *Reed & Martin, Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971), and *Garfield & Co. v. Wiest*, 432 F.2d 849 (2d Cir. 1970), *cert. den.*, 401 U.S. 940, (1971). Consequently, in attempting to demonstrate some conflict between the Second and Tenth Circuits on whether an evidentiary hearing is necessary on a claim of evident partiality on the part of the neutral arbitrator, the Petitioner has succeeded only in showing that, in the Second Circuit, as in the Tenth Circuit, evidentiary hearings are a matter of discretion and not justified in every case. If the rule were otherwise, there is an "obvious possibility" that a suspicious or disgruntled party could seize upon an undisclosed relationship "as a pretext for invalidating the award." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. at 151; *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d at 700. Thus, in the "special context of what are in effect post hoc efforts to induce arbitrators to undermine the finality of their own awards evidentiary hearings should be limited to situations where clear evidence of impropriety has been presented." *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d at 702. That is not the case here. Petitioner has presented no clear evidence of any impropriety and an evidentiary hearing was properly denied, particularly where, as here, Petitioner's efforts "appear to be yet one more attempt to avoid the consequences of an arbitration upon which [he] insisted." 668 F.2d at p. 1148.

III. THE DISTRICT COURT DID NOT "INTERFERE" IN THE ARBITRATION PROCEEDINGS; PETITIONER'S POINT III PRESENTS NO QUESTION CALLING FOR REVIEW BY THIS COURT.

In his Point III, Petitioner complains that the Court of Appeals allowed the District Court to "interfere" with the arbitration proceedings and, therefore, for some unexplained reason, this Court should "take action to restrict and prohibit the interference of district courts in arbitration proceedings." (Petition, p. 15). Most of the claims presented in Petitioner's Point III were not presented either to the District Court or the Court of Appeals, none of the claims has any merit, and certainly nothing is presented calling for review by this Court on certiorari. Under this point, Petitioner has not even argued that any ruling of the District Court or the Court of Appeals justifies review by certiorari under the parameters set forth in Rule 17.1 of the Rules of this Court.

The first argument raised in Petitioner's Point III is that the District Court should have dismissed Respondent's cross claims against Petitioner in view of the arbitration provision in the leases, rather than staying the proceedings. This point was not raised either in the District Court or the Court of Appeals and, therefore, provides no basis for review by this Court. *See, Ramsey v. United Mine Workers of America*, 401 U.S. 370, 312-13, (1971). Clearly the District Court committed no error in staying the proceedings pending arbitration, and outright dismissal was not required. No determination has been made in this action whether the arbitration was governed by the New Mexico Arbitration Act, § 44-7-1, *et seq.*, N.M.S.A. (1978 Comp.) or the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, or both. The issue is of no moment because of the similarity between the New Mexico Act and the Federal Act. The New Mexico Act in § 44-7-2(B), *supra*, provides for a stay of any action or proceeding if there is an order for arbitration. The Fed-

eral Act, in 9 U.S.C. § 3, has a similar requirement for a stay. In staying the actions, then, the District Court merely complied with the applicable statute. Dismissal would have been erroneous.

Next, Petitioner complains (Petition, p. 12) that the District Court "entered orders regarding discovery during the arbitration process." Again, this point was not presented either to the District Court or the Court of Appeals and cannot form the basis for review in this Court. Moreover, no error was committed by the District Court with respect to discovery in the arbitration proceedings. The parties stipulated on May 19, 1978, in the arbitration that both parties would be entitled to discovery by way of submission of written interrogatories, inspection of documents, and examination or deposition of witnesess. Respondent caused the issuance, from the District Court, of numerous subpoenas for depositions in aid of the arbitration. The New Mexico Arbitration Act specifically provides that subpoenas for attendance of witnesses "shall be served and, upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action." § 44-7-7 N.M.S.A. (1978 Comp.). Numerous federal courts have recognized the propriety of issuance and enforcement of subpoenas by the court which has ordered an arbitration in aid of the arbitration. *See, Steamship Co. of 1949, Inc. v. The China Union Lines, Hong Kong, Ltd.*, 123 F.Supp. 802 (S.D. N.Y. 1954); *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F.Supp. 240 (E.D. N.Y. 1973); *Donahoe v. Susquehanna Colleries Co.*, 49 F.Supp. 843 (M.D. Pa. 1943), *rev'd*, 183 F.2d 3 (3d Cir. 1943), *rehearing*, 66 F.Supp. 588 (M.D. Pa. 1946), *rev'd*, 160 F.2d 661 (3d Cir. 1947); *International Association of Heat and Frost Insulators and Asbestos Workers Local 66, AFL-CIO v. Leona Lee Corp.*, 434 F.2d 192, 194 (5th Cir. 1970). Subpoenas, or orders concerning discovery, issued by the arbitrators do not have the force of law. That is precisely why the

arbitration act and the cases in point permit a court which has ordered arbitration to issue further orders in aid of the arbitration, including orders pertaining to discovery where discovery has been agreed to by the parties, ordered by the arbitrators, or is otherwise proper. The only "orders regarding discovery" entered by the District Court here consisted of an Order (R. II, 464) denying the Motion of Defendants Michael and Corinne Grace for a Protective Order Quashing Subpoenas for the Depositions which Petitioner had agreed could be taken in the Stipulation for Discovery, and an Order allowing the taking of the deposition of Corinne Grace (R. II, 485) who was then incarcerated in a federal correctional institution in California. Clearly, no error was committed by the District Court in issuing these Orders in aid of the arbitration, as was recognized by Petitioner's former attorneys by their not having complained of such Orders either in the District Court or the Court of Appeals.

Petitioner next contends (Petition, p. 12) that the District Court "directed that the arbitration hearing proceed despite the illness of Petitioner at the commencement of the arbitration hearings." This seriously misrepresents the record. The first Opinion of the District Court (R. III, 717; *see*, App. D to Petition) points out that when the arbitrators finally scheduled the hearing on the merits in the arbitration almost two years after the Order directing arbitration, due principally to delays caused by Petitioner (R. III, 718), Petitioner changed his attorneys two weeks prior to the scheduled hearing and sought a continuance on that basis. Over Respondent's objection, a continuance was granted but only upon the promise of Petitioner's new counsel that no more continuances would be sought. The District Court found this demand to the arbitrators "completely reasonable for there had been nearly a two-year lapse since this Court had stayed proceedings pending arbitration and nearly three years since the first arbitration demand had been made." (R. III, 729). When the rescheduled arbitration hearing began,

Petitioner was absent for the first five days of the two and one-half week hearing because of emergency surgery. However, as the District Court found, "no demand for relief from his prior promise or for a continuance was made by counsel." (R. III, 729). Thus, the District Court did not direct that the arbitration proceed despite the illness of Petitioner; no request for a continuance was made either of the arbitrators or of the District Court. Moreover, as the District Court found (R. III, 729-30), the portion of the arbitration hearing which Petitioner missed consisted of the presentation of his own case, Petitioner did appear to testify on his own behalf, and was present throughout the presentation of evidence by Respondent. As the District Court further found, the claim that the arbitration should not have proceeded because Petitioner was absent for the first few days of the hearing is "completely without merit." (R. III, 729). Again, this was recognized by Petitioner's former attorneys, as this point was not raised in the Court of Appeals.

Petitioner also complains of the District Court's statement (Petition, p. 12) that the District Court was reconsidering its decision to order arbitration and was considering abolishing the Stay Order. This comment was made during the hearing on the Motion by Petitioner seeking to quash the subpoenas which had been issued in aid of taking the depositions which he had agreed to and which the arbitrators had ordered to be taken. The result of the hearing was the Minute Order of February 1, 1979 (R. II, 464) denying Petitioner's Motion for a Protective Order. Even if the District Court had abolished the Stay Order, such action would have been proper by reason of Petitioner's numerous delays in the arbitration (R. III, 718) which the District Court very well could have found constituted a waiver of the right to arbitrate or a "default in proceeding" with the arbitration. *See*, 9 U.S.C. § 3; *Reid Burton Constr. Inc. v. Carpenters Dist. Council, etc.*, 614 F.2d 698 (10th Cir. 1980), *cert. den.*, 449 U.S. 824, (1980); *Commercial*

Iron & Metal Co. v. Bache Halsey Stuart, Inc., 581 F.2d 246 (10th Cir. 1978), *cert. den.*, 440 U.S. 914, (1979). However, the District Court did not lift the Stay Order, but allowed the arbitration to proceed, and in fact did not grant Respondent's Motion to Lift the Stay Order (R. III, 487). The fact that the District Court, in expressing its exasperation at Petitioner's efforts to delay the arbitration proceeding, stated that it was considering lifting the Stay Order presents no question for review by this Court, and was not even made the basis of any point urged by Petitioner in the District Court or the Court of Appeals.

Finally, Petitioner contends (Petition, p. 13) that the District Court erred in ordering Petitioner to dismiss his second demand for arbitration, filed in California after the District Court had confirmed the New Mexico arbitration award. This "second bite at the apple" was the subject of a separate appeal before the Tenth Circuit, numbered 81-1161. The second demand for arbitration filed in California on November 14, 1980 (four months after Petitioner had appealed confirmation of the New Mexico arbitration award to the Tenth Circuit), made three claims:

1. That Respondent was unjustly enriched as a result of Petitioner's expenditure in exploring the leased properties for uranium;

2. That Respondent owed a duty to Petitioner to submit an offer by Gulf to accept an assignment of Petitioner's leases; and,

3. That the arbitrators in the New Mexico arbitration had a duty to examine and admit into evidence "similar leases" between Respondent and other lessees.

All of these issues were litigated in the New Mexico arbitration. Petitioner's claims of "unjust enrichment" were argued, and evidence offered concerning them, in the New Mexico arbitration (R. VI, 12-13; R. X, 832);

and, the only Memorandum Brief submitted by Petitioner's counsel to the arbitrators was entitled "Memorandum Brief—Unjust Enrichment."

One of the principal grounds urged by Petitioner in the District Court and the Court of Appeals for vacation of the New Mexico Arbitration Award was his claim that the arbitrators refused to consider or admit in evidence "similar leases". This claim was soundly rejected by both Courts. It is difficult to imagine how an arbitration panel in California could determine that the arbitrators in New Mexico had "breached duties" to Petitioner in refusing to hear evidence concerning "similar leases" after the District Court and Court of Appeals found that the arbitrators had in fact considered the evidence and, in any event, had not acted improperly in refusing to hear any evidence.

The claim that Respondent refused to submit an offer from Gulf was likewise litigated in the New Mexico arbitration. In fact, Respondent simply referred Gulf to Petitioner, and Gulf then unsuccessfully negotiated with Petitioner for an assignment of the leases. (R. X, 852, 941; R. XI, 1105; R. XII, 1413-37; R. XVI, 2105-06). The District Court and Court of Appeals were clearly correct in ruling that the matters presented by the California arbitration were barred by *res judicata*. *Box v. Rundell*, 179 F.2d 626 (10th Cir. 1950); *Katzburg v. Krebs*, 545 F.2d 104 (10th Cir. 1976); *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (App. 1975), *cert. den.*, 87 N.M. 450, 535 P.2d 657 (1975). *Overseas Motors, Inc. v. Import Motors, Ltd.*, 375 F.Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975), *cert. den.*, 423 U.S. 987, (1975), relied upon by Petitioner (Petition, pp. 13-14), actually supports the conclusions of the District Court and Court of Appeals that the arbitration award and its confirmation barred Petitioner's second attempt to arbitrate the same issues in California. And, Petitioner does not even bother to attack the rulings of the Court of Appeals that the District Court had the

power to order Petitioner to dismiss the California arbitration in aid of the appeal from the judgment confirming the arbitration award, and that the issues sought to be arbitrated in California, even if they had not been arbitrated in New Mexico, would be waived by failure to assert them in the earlier New Mexico arbitration. 668 F.2d at 1152-53.

In summary, Petitioner's Point III is a hodge-podge of arguments, most of which were never presented to the District Court or Court of Appeals, is clearly without merit and presents no question worthy of review by this Court.

IV. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS CONDEMNED SOLUTION MINING; THE ARBITRATORS PROPERLY HELD THAT PETITIONER HAD FAILED TO ACHIEVE PRODUCTION OF URANIUM IN COMMERCIAL QUANTITIES.

Petitioner's Point IV argues that the District Court and Court of Appeals held that solution or "in situ" mining of uranium could not qualify as "commercial production." This is a gross misstatement of the record. Although evidence presented at the arbitration hearing indicated that solution mining was not contemplated by the subject leases, and Petitioner's own witnesses considered it an inappropriate method of mining, possibly injurious to the property (R. IX. 735-36, R. XV 2038-40), the record of the arbitration hearing, the award, and the proceedings leading to its confirmation all make clear that the basis of the award was Petitioner's failure to achieve production in commercial quantities, and not any holding that solution mining *per se* was improper or could not produce uranium-bearing ore in commercial quantities.

The "commercial quantities" or "paying quantities" test, limiting the term of a mineral lease, is familiar throughout the mineral industry. Contrary to Petitioner's statement that only "some oil and gas leases" use the

term (Petition, p. 16), such a limitation upon the term of a mineral lease is used almost universally where leases or estates are not granted for a specific term of years. Use of such terms in habendum clauses of mineral leases has been recognized by "a vast majority of the courts" as conveying an interest subject to a special limitation, *i.e.*, lack of production in commercial or paying quantities at the end of the primary term results in an automatic termination of the lessee's interests. 3 H. Williams, Oil and Gas Law, 36-38 (1978); *Vernon v. Union Oil Co. of Cal.*, 270 F.2d 441 (5th Cir. 1959); *Reese Enterprises Inc. v. Lawson*, 220 Kan. 300, 553 P.2d 885 (1976). This Court has previously recognized such usage of the terms. *See Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 277-78, (1934). *See, also, Andrus v. Shell Oil Co.*, 446 U.S. 651, (1980). The construction by a majority of the courts—as an automatic limitation or termination of the lessee's estate if production in commercial quantities has not been achieved by the end of the primary term

> "seems in accord with the intent of the parties and sound policies . . . the special limitation placed on the duration of the lessee's interest is not a frivolous collateral condition or a whimsical limitation on the use of the interest.
>
> * * * *
>
> Rather, the basis of the majority rule is that the parties to the lease intended that a lessee should not be permitted to hold a lease after the expiration of the primary term for speculative purposes only."

3 H. Williams, *supra*, at pp. 38, 60. While reported cases construing "commercial" or "paying" quantities most often involve oil and gas leases, it has been recognized that the construction of such terms by those courts is applicable to similar usages of the terms as limitations upon a lessee's estate in other mineral leases, including uranium leases. *See*, T. Greene, *Conveyancing Problems in Uranium Mining Rights*, 5 Utah Law Review, 29, 41 (1956); *Smith v. Holmes*, 181 Kan. 438,

312 P.2d 228 (1957); *Treasure City v. Mountain States Clay Products*, 132 Mont. 12, 313 P.2d 1028 (1957). New Mexico has recognized that principles of construction applicable to oil and gas leases are likewise applicable to similar terms found in other mineral leases. *Darr v. Eldridge*, 66 N.M. 260, 346 P.2d 1041 (1959). The United States has frequently used the terms "commercial quantities" or "paying quantities" in statutes and regulations as limiting the term of oil and gas and other mineral leases. *See, e.g.*, 25 U.S.C. § 396(a); 25 U.S.C. § 398; 30 U.S.C. § 187(a); 30 U.S.C. § 226-1; 43 U.S.C. § 1337; 15 U.S.C. § 3312.

The "commercial quantities" or "paying quantities" test means, as Petitioner admits, that production must at least "pay its way," or produce revenues in excess of costs of production. (Petition, p. 16.) Discovery alone does not constitute "production" in commercial or paying quantities. 3 H. Williams & C. Meyers, Oil and Gas Law, § 604.1 at 42.4; *Greer v. Salmon*, 82 N.M. 245, 479 P.2d 294 (1970). Production in "commercial quantities" requires a quantum of minerals produced sufficient to pay operating costs plus some profit. *Greer v. Salmon, supra*; *Champion Ventures, Inc. v. Dunn*, 567 P.2d 724 (Wyo. 1977); 12 W. Sommers, The Law of Oil and Gas, § 306 at pp. 335-36 (1959); 3 H. Williams & C. Meyers, Oil and Gas Law, § 334.7 (1977); Meyers, Habendum Clauses in Term Mineral and Royalty Deeds, 6 Rocky Mountain Mineral Law Institute 551, 603-09 (1961); *Annotation*, "Meaning of Paying Quantities in Oil and Gas Lease," 43 A.L.R.3d 8 (1972). Almost without exception, the witnesses testifying at the arbitration agreed with this interpretation as applicable to the uranium mining industry in the area of the subject leases. (R. VII, 706; R. VIII, 997; R. IX, 1130-33; R. XI, 1539-40, 1697-98; R. XII, 1748-1813; R. XIII, 1981-2023, 2034-52). Contrary to Petitioner's contention (Petition, p. 16), the Federal Energy Regulatory Commission has not concluded that "production in commercial quantities has occurred if natural gas has been sold and delivered." To

the contrary, the FERC, in 18 C.F.R. § 271.204(C), defined "commercially producible" as requiring a completed well which "can reasonably be expected to produce natural gas in quantities sufficient to yield revenues in excess of operating costs." The portion of the regulation cited by Petitioner actually states that a rebuttable presumption exists that production in commercial quantities has not occurred if natural gas has not been sold. Likewise, *Rummell v. Bailey*, 7 Utah 2d 137, 320 P.2d 653 (1958), relied upon by Petitioner (Petition, p. 32), did not deal with the issue of extension of the term of a mineral lease by production in commercial or paying quantities. Rather, that case involved the test of "discovery" of a valuable mineral under 30 U.S.C. § 23. It has been specifically recognized that a valuable mineral may have been "discovered" even though the deposit may not contain ore "in paying quantities." *Chrisman v. Miller*, 197 U.S. 313, (1905). *See, also, Andrus v. Shell Oil Co.*, 446 U.S. 651, (1980). As noted above, most courts considering the question, including New Mexico, have held that a mere "discovery" of a valuable mineral does not amount to production in commercial quantities so as to extend the term of the lease. *Greer v. Salmon, supra.*

Petitioner's "production" at his three last-minute "mining" operations fell woefully short of commercial production under any definition of that term. The pit mining operation produced total revenues of $62 which did not even pay the cost of transporting the ore "mined" from the lease site to the mill. One of the solution mining operations produced $4,134 in revenue against expenses of over $45,000, and the other produced revenues of $652.24 against costs in excess of $25,000. Clearly, the arbitrators ruled properly in holding that Petitioner was not "producing uranium-bearing ore in commercial quantities" from the leases and that the leases had automatically terminated. This ruling resulted simply from Petitioner's own failure to achieve production in commercial quantities, not from any condemnation by the

arbitrators, the District Court, or the Court of Appeals of "in situ" or "solution" mining.

Petitioner's argument in Point IV again was not presented to the District Court or Court of Appeals. The definition of "commercial production" applied by the arbitrators comports with the rule followed by the vast majority of courts in the United States. Far from discouraging production of needed natural resources, use of the "commercial" or "paying" quantities test as limiting the term of mineral leases, and the definition of that test applied by the courts, encourages resource production. As noted in 3 H. Williams, Oil and Gas Law, 60 (1978), the majority rule is founded upon the proposition that a lessee should not be permitted to hold a lease, without production, after expiration of the primary term for speculative purposes only. *See, also, Town of Tome Land Grant Inc. v. Ringle Development Co.*, 56 N.M. 101, 105, 240 P.2d 850, (1952). The majority definition of "commercial production" applied by the arbitrators here actually encourages rapid development of needed natural resources. In any event, none of the rulings of the arbitrators, the District Court, or the Court of Appeals present any question calling for review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that Petitioner's writ of certiorari should be denied.

Respectfully submitted,

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July 26, 1982

STATUTORY APPENDIX

STATUTORY APPENDIX

9 U.S.C. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

9 U.S.C. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the pro-

ceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

Title 44, N.M.S.A. (1978 Comp.):

44-7-2. Proceedings to compel or stay arbitration.

* * * *

B. On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

* * * *

44-7-3. Appointment of arbitrators by court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

44-7-7. Witnesses; subpoenas; depositions.

A. The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books,

records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

B. On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

C. All provisions of law compelling a person under subpoena to testify are applicable.

D. Fees for attendance as a witness shall be the same as for a witness in the district court.

44-7-12. Vacating an award.

A. Upon application of a party, the court shall vacate an award where:

• • • •

(2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

• • • •

44-7-16. Application to court.

Except as otherwise provided, an application to the court under the Uniform Arbitration Act [44-7-1 to 44-7-22 NMSA 1978] shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.